92-265

Supreme Court, U.S.
FILED
AUG 7 1992
OFFICE OF THE CLERK

No. 92 - _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

In re DANIEL VASQUEZ,
Warden of San Quentin
Prison and
DANIEL E. LUNGREN,
Attorney General of the
State of California

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (MARY M. SCHROEDER, BETTY B. FLETCHER, AND STEPHEN S. TROTT, CIRCUIT JUDGES) AND FOR WRIT OF PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA (RUDI M. BREWSTER, DISTRICT COURT JUDGE)

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON, Chief Assistant
Attorney General
GARY W. SCHONS, Senior Assistant
Attorney General
LOUIS R. HANOIAN
Supervising Deputy Attorney General
HOLLY D. WILKENS
Deputy Attorney General
PAT ZAHAROPOULOS,
Supervising Deputy Attorney General

110 West A Street, Suite 700
San Diego, CA 92101
Telephone: (619) 237-7857

Attorneys for Petitioner

QUESTION PRESENTED

Can a state condemned inmate, who is appealing the denial of a petition for writ of habeas corpus, return to the district court and reopen his "first" habeas petition in order to raise previously abandoned claims by way of a FRCP Rule 60(b) motion, thereby avoiding application of Rule 9(b) of habeas corpus rules and this Court's pronouncements on abuse of the writ?

PARTIES

Warden Daniel Vasquez and California Attorney General Daniel E. Lungren.

Bernard Hamilton, an inmate sentenced to death under the laws of California, is the subject of the underlying appeal.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	3
JURISDICTION	5
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE WRIT	37
REMANDING AN APPEAL TO EXPAND THE CLAIMS OF THE ORIGINAL WRIT PETITION WITH KNOWN-ABANDONED CLAIMS, DELAYS EXECUTION OF THE STATE'S VALID JUDGMENT OF DEATH AND PERMITS THE PIECEMEAL LITIGATION AND GAMESMANSHIP PRECLUDED BY RULE 9(B) OF THE HABEAS RULES AND MCCLESKEY V. ZANT	37
A. The Ninth Circuit Remand For Purposes of the District Court Entertaining a Rule 60(b) Motion is Contrary to the Law Governing Habeas Corpus Procedure and in Excess of the Appellate Court's Jurisdiction	39
B. The Remand for a Rule 60(b) Motion is Inconsistent With the Prompt Resolution of Hamilton's Appeal	48
C. This Court is Empowered to Grant Petitioner Relief	53

TABLE OF CONTENTS

		Page
D.	The State Has No Other Adequate Remedy Available to Redress the Appellate Court's Jurisdictional Error	56
CONCLUSION		58

TABLE OF AUTHORITIES

Page

Cases

Bankers Life & Casualty Co. v. Holland,
346 U.S. 379 (1953) 55

California v. Hamilton,
476 U.S. 1301 (1986) 7

Carriger v. Lewis,
___ F.2d ___,
Filed 7/28/92,
92 DAR 10417 (9th Cir. 1992) 43

Coleman v. Thompson,
501 U.S. ___,
115 L.Ed.2d 640
111 S.Ct. 2546 (1991) 45

F.T.C. v. Dean Foods Co.,
384 U.S. 597 (1966) 54

Hamilton v. California,
488 U.S. 1047 (1989) 7

Hamilton v. Vasquez,
882 F.2d 1469 (9th Cir. 1989) 11

Harris v. Vasquez,
949 F.2d 1497 (9th Cir. 1991) 47

In re Blodgett,
502 U.S. ___,
116 L.Ed.2d 669
112 S.Ct. 674 (1992) 48, 50

Kerr v. United States Ct.
for N.Dist. of Cal.,
426 U.S. 394 (1976) 54

TABLE OF AUTHORITIES

	Page
Cases	
Maryland v. Soper (No. 1), 270 U.S. 9 (1926)	54
McCleskey v. Zant, 499 U.S. ___, 113 L.Ed.2d 517 111 S.Ct. 1454 (1991)	40, 41
Neuschafer v. Whitley, 860 F.2d 1470 (9th Cir. 1988)	44
Pennsylvania v. Finley, 481 U.S. 551 (1987)	45
People v. Hamilton, 41 Cal.3d 408 221 Cal. Rptr. 902 710 P.2d 981 (1985)	6
People v. Hamilton, 45 Cal.3d 351 247 Cal.Rptr. 31 753 P.2d 1109 (1988)	7, 8
Pitchess v. Davis, 421 U.S. 482 (1975)	40
Roche v. Evaporated Milk Assn., 319 U.S. 21 (1943)	54
Sawyer v. Whitley, ___ U.S. ___, 60 U.S.L.W. 4655 (6/22/92)	40, 41
Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978)	54

TABLE OF AUTHORITIES

Page

Statutes

U.S.C, Title 28, § 1651(a) 38

Rules

Rules Governing 2254 Proceedings

Rule 11 39

Federal Rules of Civil Procedure

Rule 60(b) 37

United States Supreme Court Rules

Rule 20.1 38

No. 92 -_____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

In re DANIEL VASQUEZ,
Warden of San Quentin
Prison and
DANIEL E. LUNGREN,
Attorney General of the
State of California

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (MARY M. SCHROEDER, BETTY B. FLETCHER, AND STEPHEN S. TROTT, CIRCUIT JUDGES) AND FOR WRIT OF PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA (RUDI M. BREWSTER, DISTRICT COURT JUDGE)

Petitioners pray that, pursuant to the All Writs Act, (section 1651, subdivision (a) of Title 28 of the United States Code), a Writ of Mandamus be issued in Hamilton v. Vasquez, Case Numbers 91-56251, 91-56252, and 91-56295, to compel the United States Court of Appeals for the Ninth Circuit (the Honorable Mary M.

Schroeder, Betty B. Fletcher, and Stephen S. Trott, Circuit Judges), to vacate an order permitting a remand to the district court during the pendency of the appeal from the denial of Hamilton's second and fifth petitions for habeas corpus and a writ of prohibition be issued in Hamilton v. Vasquez, Case Numbers CV-86-2102-B and 90-0291-B, to prevent the United States District Court for the Southern District of California (the Honorable Rudi M. Brewster, Judge), from conducting further proceedings pursuant to that remand.

The remand by the Ninth Circuit allows Hamilton to move the district court pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for the purposes of revisiting his "first" petition for writ of habeas corpus in order to amend that petition to bring additional claims he declined to bring prior to an extensive evidentiary hearing in the district court,

and the issuance of a decision by the district court.[1/] Permitting a motion pursuant to Rule 60(b) during the pendency of Hamilton's appeal is in excess of the appellate court's jurisdiction and contrary to this Court's decisions on abuse of the writ and the prompt resolution of appeals from denials of habeas corpus in capital cases.

OPINIONS BELOW

Bernard Hamilton, the party to the underlying appeal, is an inmate sentenced to death under the laws of California. A federal stay of execution remains in effect. On August 23, 1991, the United States District Court denied

---

1. An appeal is pending on the denial of Hamilton's "first" amended petition filed by his attorneys on October 22, 1990. Hamilton was to bring forward all of his known claims but basically incorporated the claims of his second and fifth pro per petitions. Hamilton has filed seven petitions in California state courts and five in federal courts.

Hamilton's second and fifth federal habeas corpus petitions in a 93 page memorandum opinion. (Appendix A.) An appeal is now pending before the Court of Appeals for the Ninth Circuit. Hamilton's attorneys have filed their opening brief, the time for Hamilton to file a separate opening brief in pro se has passed and petitioner filed a responding brief in the Ninth Circuit Court of Appeals on July 29, 1992.[2/]

During the pendency of the appeal, the Ninth Circuit issued a remand on July 7, 1992, to the district court to enable Hamilton to reopen habeas proceedings under Rule 60, subdivision (b) of the Federal Rules of Civil Procedure

---

2. The pro se brief was due June 29, 1992. Petitioners received a 56 page pro se brief on July 31, 1992. A motion to file the belated brief is currently pending before the Ninth Circuit Court of Appeals.

and amend his "first" petition to bring additional claims. (See Appendix B.)

On July 17, 1992, petitioners filed a motion to recall the mandate and to reconsider the July 7, 1992 order granting Hamilton's motion for remand. On July 31, 1992, the Ninth Circuit denied that motion. The hearing on Hamilton's Rule 60 motion in the district court is now calendared for August 26, 1992.

JURISDICTION

Sections 1651, subdivision (a) and 2254 of Title 28 of the United States Code and Rule 20.1 of the United States Supreme Court Rules give jurisdiction to this Court.

Jurisdiction in the district court over Hamilton's petition for writ of habeas corpus was pursuant to sections 2241, subdivision (a) and 2254 of Title 28 of the United States Code.

Jurisdiction in the Court of Appeals over an appeal from the denial of the petition for writ of habeas corpus is pursuant to section 1291 of Title 28 of the United States Code.

STATEMENT OF THE CASE

A. Procedural Background

1. Direct Appeal

A jury convicted Hamilton of the murder of Eleanore Buchanan and he was sentenced to death on March 2, 1981. The California Supreme Court set aside the special circumstance finding and reversed the penalty of death after a majority of the court concluded that it was possible Hamilton did not intend to kill Mrs. Buchanan, as he may have removed her head and hands to prevent identification after an accidental killing during the course of kidnapping and robbing her. (People v. Hamilton, 41 Cal.3d 408, 221 Cal. Rptr. 902, 710 P.2d 981 (1985) ("Hamilton I").)

Following California's petition for writ of certiorari, this Court remanded the case to the California Supreme Court for reconsideration. (California v. Hamilton, 476 U.S. 1301, (1986).) On remand, Hamilton's conviction and sentence of death were affirmed by the California Supreme Court. (People v. Hamilton, 45 Cal.3d 351, 247 Cal.Rptr. 31 753 P.2d 1109 (1988) ("Hamilton II").)

On January 23, 1989, this Court denied Hamilton's petition for writ of certiorari. (Hamilton v. California, 488 U.S. 1047 (1989).)

2. State Court Collateral Review

To date, Hamilton has filed seven petitions for writ of habeas corpus in the California Supreme Court collaterally attacking his conviction and sentence of death. His first petition for writ of habeas corpus before the California Supreme Court was filed on

January 23, 1986. (In re Hamilton, Case No. 25095.) The petition was denied on March 13, 1986. A second petition for writ of habeas corpus was filed with the California Supreme Court on August 3, 1987. (In re Hamilton, Case No. S001870.) The second petition was denied in the opinion which decided Hamilton's direct appeal. (People v. Hamilton, supra, 45 Cal.3d 351.)

A third petition for writ of habeas corpus was filed with the California Supreme Court on May 27, 1988, and denied on July 14, 1988. (In re Hamilton, Case. No. S005806.) A fourth petition for writ of habeas corpus was filed with the California Supreme Court on June 1, 1988, and denied on July 14, 1988. (In re Hamilton, Case No. S005871.) A fifth petition for writ of habeas corpus was filed with the California Supreme Court on May 5, 1989, and denied on June

22, 1989. (In re Hamilton, Case No. S010092.) A sixth petition for writ of habeas corpus was filed with the California Supreme Court on February 27, 1990, and denied on March 15, 1990. (In re Hamilton, Case No. S014318.) Hamilton's seventh petition for writ of habeas corpus was denied by the California Supreme Court on February 19, 1992. (In re Hamilton, Case No. S024477.)

3. Federal Habeas Petitions

Hamilton has filed five federal habeas corpus petitions. The first was filed in the United States District Court for the Southern District of California (hereinafter "district court") on April 2, 1986. (Hamilton v. Vasquez, Case No. 86-0809-T.) Hamilton raised claims of ineffective assistance of counsel and denial of the right of self-representation. The petition was denied on the merits on September 4, 1986. On

September 24, 1987, the Ninth Circuit Court of Appeals vacated the judgment as premature based on Hamilton's failure to exhaust state court remedies. On September 30, 1987, the petition was dismissed without prejudice to refiling the petition following exhaustion. The issues in the petition were subsequently raised in a third petition filed in federal court.

A second petition was filed in the district court on October 9, 1986. (Hamilton v. Vasquez, Case No. 86-2101-B.) Hamilton claimed that shackling him during trial violated his constitutional rights. The petition was denied by the district court on the merits on November 19, 1987. Following an appeal to the Ninth Circuit, the case was remanded on August 23, 1989, with directions to the district court to review and consider the entire state court record before ruling on

the petition. (Hamilton v. Vasquez, 882 F.2d 1469, 1473 (9th Cir. 1989).) The claims in the second petition were subsequently consolidated with Hamilton's fifth federal habeas petition.

A third petition which raised the same claims contained in Hamilton's first federal petition was filed in the district court on September 30, 1987. The petition was dismissed by the district court on August 31, 1988. (See Appendix A, at p. 4.) Hamilton's subsequent appeal to the Ninth Circuit was also dismissed on September 7, 1990, as moot in light of the Ninth Circuit ruling in Hamilton v. Vasquez, 882 F.2d 1469 (9th Cir. 1989) which remanded Hamilton's second federal petition to the district court for further proceedings.

A fourth petition was filed on June 20, 1989, in the United States District Court for the Northern District

of California claiming ineffective assistance of counsel, denial of a fair trial, denial of due process, and a denial of access to the prison library. The petition was transferred to the United States District Court for the Southern District of California. The district court denied the petition on July 19, 1989, after finding that the grounds for relief, either were, or should have been, presented in previous petitions to the court.

A fifth petition was filed in the district court on March 7, 1990. (Hamilton v. Vasquez, Case No. 90-0291-B.) The fifth petition was consolidated with Hamilton's second federal petition (case number 86-2101-B) on June 8, 1990.

4. Hamilton's Waiver of Claims

Meanwhile, on October 17, 1989, prior to Hamilton filing his "first"

amended federal habeas petition,[3/] petitioners brought a motion in the district court to compel Hamilton to bring forward, or waive, all known claims. On March 8, 1990, pursuant to that motion, the district court ordered Hamilton to inform the court of any and all additional habeas claims of which he was aware.

On June 8, 1990, Hamilton filed a list of 38 potential habeas claims with the district court. Hamilton also conceded that many of those claims had never been raised in state court, and were unexhausted. On the same day, the district court provided Hamilton with additional counsel and also granted Hamilton until August 8, 1990, to return

---

3. The district court has held that Hamilton's amended petition of October 22, 1990, (consolidated second and fifth federal petitions) constitutes his "first" petition for purposes of Rule 9(b) of the Rules Governing Section 2254 Proceedings regarding successive and abusive petitions.

to state court and exhaust remedies as to all unexhausted habeas claims. On August 2, 1990, at his request, Hamilton was granted additional time, until August 20, 1990, to exhaust state court remedies on any additional habeas claims.

Acting in his own behalf, on August 16, 1990, Hamilton filed a notice of abandonment of known habeas claims. (Appendix C.) On August 21, 1990, counsel for Hamilton informed the federal court that they had failed to file any identified and unexhausted claims in state court.

In lieu of deeming all unexhausted claims waived, the district court granted Hamilton yet another extension of time until October 22, 1990, to permit him to pursue unexhausted claims in state court. The district court also stated that in the event Hamilton filed claims in state court, the federal

proceedings would be stayed until such time as all the claims were exhausted in state court.

In a September 18, 1990, order, the district court explicitly notified Hamilton that "as of October 22, 1990, he would be deemed to have waived and abandoned any and all habeas corpus claims not yet filed in state court and any exhausted habeas claims not yet raised in his federal petition." (Appendix D.)

On October 18, 1990, Hamilton, acting in his own behalf, amended his fifth federal petition. (Hamilton v. Vasquez, Case Nos. 86-2101-B; 90-0291-B.) On October 22, 1990, Hamilton's counsel filed an amended and consolidated petition. Neither Hamilton nor his counsel pursued any additional claims in state court, despite the passage of nearly eight months, from February 26, 1990, through October 22, 1990, wherein he was

repeatedly ordered by the court to do so to avoid a waiver of claims.

On November 21, 1990, the district court found that Hamilton had intentionally waived and abandoned any and all habeas claims not yet filed in state court, and any exhausted claims not yet filed in federal court, in accordance with the district court's previous order of September 18, 1990. (Appendix. A., pp. 10-11.)

5. District Court Evidentiary Hearing

On April 23, 1991, a three-week evidentiary hearing commenced in district court before the Honorable Rudi M. Brewster, on issues of shackling and ineffective assistance of counsel; including defense investigation of Hamilton's whereabouts and defenses. Hamilton was transported from death row at San Quentin state prison in Northern California to the federal courthouse in

San Diego in early April, and was present in court throughout the proceeding.

At the conclusion of the evidentiary hearing, Hamilton moved to have the hearing held open to enable him to present additional claims. The district court denied the request, citing its previous orders requiring Hamilton to pursue unexhausted claims in state court and exhausted claims in federal court by October 22, 1990, and its order finding that Hamilton had in fact waived all such claims. (Appendix E, Evid. Hrg. X RT 189-191.)

Extensive written briefs were filed by the parties following the evidentiary hearing. On July 1, 1991, Hamilton requested a stay of the federal proceedings and funds for investigation of potentially meritorious claims. On August 20, 1991, the district court denied the request for a stay. (Appendix F.)

On August 23, 1991, the district court filed a 93 page opinion denying the petition for writ of habeas corpus. (Appendix A.) The district court denied Hamilton's in pro per motion for reconsideration on September 10, 1991. Hamilton's counsel's motion to alter or amend the judgment was denied on October 31, 1991. (Appendix G.)

On November 13, 1991, a certificate of probable cause was granted and a stay issued pending disposition of Hamilton's appeal of the denial of the petition for writ of habeas corpus before the Ninth Circuit Court of Appeals.

On March 17, 1992, Hamilton filed a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure seeking to reopen the district court proceedings and amend his habeas corpus petition to bring additional claims. On July 1, 1992, the district court issued an

order stating it would entertain the motion if the Ninth Circuit remanded the case for consideration of the motion. (Appendix H.) On July 27, 1992, after remand by the Ninth Circuit, the district court calendared the hearing on Hamilton's Rule 60(b) motion for August 26, 1992. (Appendix I.)

6. Current Status of Appeal Before the Ninth Circuit

Hamilton's appeal from the denial of his consolidated and amended federal habeas petition is currently pending before the Ninth Circuit Court of Appeals in case numbers 91-56251, 91-56252, and 91-56295. Hamilton's counsel have filed the opening brief in the Ninth Circuit and petitioner responded on July 29, 1992. Hamilton's counsel's reply brief is due on August 19, 1992, and Hamilton's in pro se reply brief is due on September 12, 1992.

Meanwhile, Hamilton filed a request for a remand of his case to the district court for purposes of having his Rule 60 (b) motion heard by the district court. On July 7, 1992, the Ninth Circuit issued an order remanding the matter to the district court for purposes of Hamilton's motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. (See, Appendix B.) While the order provides that the parties are to continue briefing the appeal as previously ordered, the Ninth Circuit has not set any time limitations on the consideration of the motion in the district court. (Id.) Moreover, the Ninth Circuit order acknowledges that a full remand or further orders may become necessary depending upon events in the district court. (Id.)

On July 17, 1992, petitioners filed a motion to recall the mandate which issued immediately upon the issuance of

the order of remand and a petition for reconsideration of the remand order. The Ninth Circuit denied the motion and petition on July 31, 1992, (Appendix J) and this petition for writ of mandamus and prohibition follows.

B. Facts of the Crime.

On the evening of May 30, 1979, 24-year-old Eleanor Buchanan (the victim) had dinner with her husband and two infant sons, then left for school in their new van. They had purchased the van about six weeks earlier and her husband, a dental supply salesman, used it in his work during the day, carrying literature and samples. He told his wife there was very little gas in the van and not to add any because he was taking it to the dealer the next morning to replace the tank due to a leak.[4/] (RT 2079, 2077, 2099-2101, 2151.)

---

4. All locks and windows worked and nothing was broken on the van when Buchanan turned it over to his wife.

Mrs. Buchanan left for school at 6:30 p.m. She was wearing tan Levi's, a striped beige and brown T-shirt, white knee socks, bra, panties and a simulated leather purse. (RT 2079, 2077, 2099-2101, 2151.)

Buchanan habitually locked the van, which had valuables in it including dental equipment from her husband's work. (RT 2146, 2150-2151, 2156, 2106, 2083.)

On May 30, 1979, she left her math class early after obtaining xeroxed class notes from fellow students because an optional quiz was offered and she had been absent for the birth of her three-week-old son. Students saw her walking towards the parking lot about 9:30

When respondent was arrested in it on June 8th, the arm rest of the driver's chair, the metal rod on the ceiling that holds the curtain suspended behind the driver and the wind wing on the passenger's side were all broken. (RT 2086, 2106-2107, 2573, 2577.)

p.m. (RT 2160, 2162, 2171-2173, 2181-2183.)

At about 1:52 a.m. on May 31, 1979, Hamilton called Donna Hatch in Terrell, Texas to say he had gotten a van and was leaving for Texas when he could get gas. (RT 2363-2364, 2444-2445.)

There was a gasoline shortage during this time and fuel was sold for limited hours. Between 4:30 a.m. and 10:15 a.m. on May 31, 1979, Hamilton purchased gas for the Buchanans' van on their Visa card at Roy's Service Station off Highway 8 in El Cajon, California. He signed the invoice, "Terry Buchanan". (RT 2206-2207, 2210-2211.)

About noon on the same day, Eleanor Buchanan's headless, handless body was found in the grass near a cul-de-sac off Pine Valley Road near San Diego. The cul-de-sac was 200 yards off Interstate 8. The body was in full rigor mortis with the

elbow in an upright position, completely off the ground, when a deputy sheriff arrived at the scene between 1:30 and 2:00 p.m. Two strings of twine were attached around Buchanan's ankles and there were dark blue pieces of lint sticking to her blood. The body was clothed in a bra, underpants and socks. The head and hands were never found. (RT 2278-2279, 2289-2290.)

During the autopsy, it was determined that a horizontal stab wound in the abdomen was inflicted before death. Three superficial wounds measuring up to five inches on the abdomen were inflicted after death. The pathologist could not determine cause of death because of the absence of the head, but ruled out natural causes. He could not say whether the hands were cut off while Eleanor Buchanan was alive, but suspected she was dead because there was not much hemorrhaging.

He could not say whether she was alive when the head was cut and sawed off. (RT 2337, 2333.) Judging from the rigor mortis, death occurred about 16 hours before the autopsy, about midnight on May 30, 1979. (RT 2340-2341.)

Meanwhile, Hamilton continued to drive down Interstate 8 from San Diego to Texas. (RT 2216, 2223, 2258-2259, 2264-2265.) He arrived at Donna Hatch's home in Terrell, Texas, on the evening of June 1, 1979. He was alone. The van was dirty, had a broken arm on the driver's chair, a broken mirror and a broken wind wing. (RT 2364-2368.)

Hamilton was on bail pending trial on a robbery charge. (See RT 3563.) He took Donna with him to get addresses for his defense in that case. She saw the Buchanans' credit cards in the van and Hamilton used them for food and gas. (RT 2369-2373, 2376.)

On June 3, 1979, Donna was in the van with Hamilton and her daughter and saw a highway patrolman. When Donna suddenly turned, while talking to her little girl, Hamilton told her not to make sudden moves because they could get shot. She asked why, but he gave no direct answer. Hamilton stopped at a pay phone to call his brother and his friend, Clifton. (RT 2376-2379.) Donna heard Hamilton tell his brother he had flown to Texas. (RT 2380.)

Cliff Harris and Hamilton knew each other all their lives and were good friends. (RT 2489.) Hamilton told Harris he drove to Texas in a blue El Dorado. Harris was watching TV as they spoke and saw a report that the headless body had been found. He told Hamilton. (RT 2490-2492; 3594, 3596.)

Hamilton had changed when he returned to the van after talking to Clifton Harris. (RT 2380.) Donna asked

what was wrong. Hamilton said he thought he killed a man. When they returned to her home, Hamilton said he would let the van sit a while to see if anyone paid attention to it and that he needed Texas license plates. He asked her to go to a car lot with him to get the plates, but she refused. (RT 2380-2381.)

The next day, Donna broke up with Hamilton. Hamilton said if she had changed her mind because he had lied about his wife being dead, then he would kill the ex-wife. (RT 2382.)

Hamilton called Donna on Wednesday, June 6, 1979, to discuss bringing her back to California to testify in his robbery case. (RT 2470-2471.) At one point, a friend of Donna's also got on the phone. Hamilton said, "I'm going to kill you and your friend, too. And you won't know when I'll be around because I don't have to be driving this van, I can

be in another vehicle." (RT 2474.) Donna never saw Hamilton after that phone call. (RT 2471-2472, 2382-2384, 2475.)

Hamilton continued to use the Buchanans' credit card. It was stipulated he charged a saw, screwdriver and set of wrenches at Babcock Auto Supply in Terrell, Texas, on June 6, 1979, (2518-2519), and a butcher knife and two hanks of twine at Moses five and ten cent store on June 7, 1979. (RT 2519-2520.)

At about 8:30 a.m. on June 8, 1979, Hamilton entered Stuckey's restaurant in Marietta, Oklahoma. He charged food on Buchanans' Visa, picked up part of his food order and ran out as the manager was calling for authorization on the purchase. The manager called law enforcement authorities and described Hamilton and the van. (RT 2746-2747, 2755-2757.)

That afternoon, Hamilton was stopped by Oklahoma officers and they ran a VIN number check. They learned the van belonged to a homicide victim. The officers arrested Hamilton on the local charges. (RT 2598-2599.)

On the way to jail, Hamilton passed a poster offering a $500.00 reward for David L. Wall, alias "Spider". (RT 2578, 2581.)

On June 9, 1979, San Diego police officers questioned Hamilton in Oklahoma after reading him his Miranda rights. Hamilton said he got the van from Fran, a white woman who had left her husband for "Spider", and that he knew "Spider" for six years.[5/] Fran and Spider

---

5. Neither Hamilton's parents (RT 2048, 2078), nor friends (RT 2489-2734) ever heard of "Spider". "Fran" was Eleanor Buchanan's nickname. It was written on the school papers she was carrying on the night she disappeared and also in an unmailed birth announcement she had in her purse. (RT 2116-2117.)

were in Shreveport. They gave him the van and her charge cards to use for food and gasoline. (CT 2846-2848, 2854, 2862.)

Hamilton said he saw no blood in the van and the blood on his shoe was his own. (RT 2945-2946, 2904.) A criminalist testified at trial that the blood on Hamilton's shoe was type O, like Eleanor Buchanan's. (RT 2127.) Hamilton was type A. (RT 3112, 3110, 3114.) The criminalist further testified the blood on the shoe could not have come from the van's carpeting as it had no blue fibers in it. (RT 2127, 4017-4018.)

The police showed Hamilton a photograph of Eleanor Buchanan during questioning and asked if that were Fran. He said it looked like her but Fran was a little skinnier. Asked what Fran was wearing when she and Spider picked him up to leave San Diego, Hamilton said the only

time he saw her, she wore light jeans and a beige non-leather purse. (RT 2873-2875.)

En route to San Diego Hamilton was disturbed about the arrest for murder and kept saying it was not going to stick because all the police had was a body they could not identify and a run-away wife. (RT 2950.)

Shortly after Hamilton's return to San Diego, Terry Buchanan received a letter with Hamilton's return address in county jail. It said, "You are probably full of grief when you should be highly pissed-off . . ." because Fran was not dead but had left with Spider and was smoking Sherman sticks. Buchanan turned the letter over to the District Attorney's Office. (RT 2140-2145.)

Hamilton hinted to a local girlfriend in letters and during a jail visit that she should call Terry Buchanan

and the press, posing as Eleanor Buchanan, and tell them she was alive. (RT 3618-3621.)

On January 24, 1980, Hamilton was talking about his case to another prisoner. The prisoner said, "Who are you trying to convince, Hamilton, me or yourself?" Hamilton replied, "Well, I did it, but they'll never prove it." (RT 3023, 3030.) The prisoner reported the conversation to a guard. (RT 3032.)

While transporting Hamilton between the jail and courtroom for trial, a deputy sheriff was tightening Hamilton's security chains. Hamilton said, "You go ahead and have your fun, I'll have mine later." The guard responded, "I thought you already had your fun?" Hamilton replied, "Yeah, and I'll kill you and a lot more, too, and you may be first on my list." (RT 3327-3329.)

/

Defense

Hamilton testified that he saw the Buchanans' van parked on the street with Eleanor's purse on the passenger seat just after midnight on May 31, 1979, and took it. (RT 3608, 3439.) He never saw the victim dead or alive. (RT 3438.)[6/] Hamilton believed she was killed by the man who found the body, Harry Piper. Hamilton said he must have dumped the body and then pretended to find it. (RT 2428.)

Rebuttal

Harry Piper had two crushed vertebrae and could not lift anything at the time he found the body. (RT 3981.) Furthermore, his car was parked over the drag mark, so the body was there when he

---

6. However, he told police officers during questioning that the victim wore light colored jeans when she left with Spider (RT 2875) and she was in fact wearing tan levis when she left for school the night she disappeared. (RT 2100-2109.)

drove up. (Trial Exh. T and RT 3718, 3879.)

Penalty Phase

Hamilton had five prior felony convictions for forgery, burglary, and auto theft. (RT 4478-4479.)

On November 7, 1976, he robbed and beat Ruth Story, an elderly woman who was walking down a Linda Vista Street with a cane. (RT 4448-4452, 4552.) She was hospitalized and had reconstructive plastic surgery on her face. Five years later, she was still in pain and unable to chew even hamburger. (RT 4455, 4471-4472.) In a letter to Ms. Story dated November 17, 1978, Hamilton stated he did not know her personally. (RT 4527-4528, 4530.) Eleven days later, the district attorney received a letter from Hamilton claiming the victim used to pay him for sexual services from 1967-1969, when he was a minor. (RT 4541.)

In February, 1979, after spending the night in a motel with Rosie Blackman, whom Hamilton had seen frequently for three months, he punched and kicked her all over her body. She made no attempt to strike back. (RT 4429, 4434-4437.) A few weeks later, he came up to her at work as she was cleaning her taxi cab and repeatedly kicked her head and body. Her supervisor called the police. (RT 4435-4436.)

While in custody on October 8, 1980, Hamilton refused to go to court and assumed a fighting stance when deputies entered his cell. He had to be physically carried down the corridor. He yelled obscenities, threatened to fight the deputies and spit in the face of one of the officers. (RT 4400-4422.)

Penalty Defense

Hamilton, then 29 years old, had essentially a good home life as the sixth

of eight children. His father is a Baptist minister. (RT 4587.) He has two sons, then eight and nine year old living in Los Angeles with his ex-wife. (RT 4606-4608.) Relatives and family friends asked the jury to spare his life. (See also, People v. Hamilton, supra, 45 Cal.3d at 357-362, guilt phase facts; 364-366, penalty phase facts.)

/

/

/

/

/

/

/

/

/

/

/

/

/

REASONS FOR GRANTING THE WRIT

REMANDING AN APPEAL TO EXPAND THE CLAIMS OF THE ORIGINAL WRIT PETITION WITH KNOWN-ABANDONED CLAIMS, DELAYS EXECUTION OF THE STATE'S VALID JUDGMENT OF DEATH AND PERMITS THE PIECEMEAL LITIGATION AND GAMESMANSHIP PRECLUDED BY RULE 9(B) OF THE HABEAS RULES AND MCCLESKEY V. ZANT

The writs of mandamus and prohibition should be issued because the Ninth Circuit's remand sanctions the use of Rule 60(b) of the Federal Rules of Civil Procedure by a condemned state inmate as vehicle for raising claims which were previously abandoned, thereby rendering a nullity this Court's recent jurisprudence on abuse of the writ. Petitioner has no other adequate remedy available to prevent litigating a matter which is in excess of the jurisdiction of the Court of Appeals and the district court.

On February 26, 1990, the district court granted petitioner's

October 17, 1989, motion to have Hamilton bring his known claims or abandon them. After many opportunities to return to the state court, petitioner abandoned his claims by not including them in his amended petition on October 22, 1990, proceeding to a three-week evidentiary hearing, decision and appeal. Yet, on July 7, 1992, the Ninth Circuit remanded the case to the district court so that Hamilton could present his known-abandoned claims by way of a FRCP Rule 60 motion.

Pursuant to section 1651(a) of Title 28 of the United States Code and United States Supreme Court Rule 20.1, petitioners Vasquez and Lungren respectfully request this Court to issue a Writ of Mandamus directing the United States Court of Appeals for the Ninth Circuit (Justices Schroeder, Fletcher and Trott), to vacate, in its entirety, the order of July 7, 1992, remanding Hamilton

v. Vasquez, to the district court and a writ of prohibition to the United States District Court (Judge Rudi M. Brewster) to cease proceedings on the Rule 60(b) motion.

A. The Ninth Circuit Remand For Purposes of the District Court Entertaining a Rule 60(b) Motion is Contrary to the Law Governing Habeas Corpus Procedure and in Excess of the Appellate Court's Jurisdiction

The success of Hamilton's Rule 60(b) motion would render meaningless the limitations in habeas corpus upon deliberate abuse of the system for purposes of delay. It is this very possibility which gives rise to the absolute principle of law that the Federal Rules of Civil Procedure do not, and cannot, apply to habeas corpus proceedings when they are inconsistent with habeas corpus rules. (Rule 11, Rules Governing

2254 Proceedings; Pitchess v. Davis, 421 U.S. 482, 489-490, (1975).)

This Court has held that Rule 60 of the Federal Rules of Civil Procedure is not applicable to habeas corpus when the effect of applying the rule would be to alter the statutory exhaustion requirement of section 2254 of Title 28 of the United States Code. (Pitchess v. Davis, supra, 421 U.S. 482.) As in Pitchess, Hamilton's motion for relief under Rule 60 would circumvent the wealth of legal authority designed to prevent attempts to abuse the writ and engage in piecemeal litigation. (See, e.g., McCleskey v. Zant, 499 U.S. ___, 113 L.Ed.2d 517, 111 S.Ct. 1454 (1991); Sawyer v. Whitley, ___ U.S. ___, 60 U.S.L.W. 4655, (6/22/92); Rule 9(b) Rules Governing 2254 Proceedings.)

Rule 9(b) of the Rules Governing Section 2254 Proceedings provides for the dismissal of subsequent petitions which

present new or different grounds, when the failure to assert those claims in prior petitions constitutes an abuse of the writ. When the government pleads abuse of the writ in a second or subsequent habeas petition, it is incumbent on the petitioner to show "cause" for failing to raise the claim and "prejudice" from the failure.

In the absence of a showing of "cause and prejudice", the petitioner must show a fundamental miscarriage of justice would result if the claim is not entertained. (McCleskey v. Zant, supra, 113 L.Ed.2d 517.) A miscarriage of justice requires the petitioner to show that a constitutional violation has probably caused the conviction of someone actually innocent of the crime or penalty. (Sawyer v. Whitley, supra, 60 U.S.L.W. 4655.)

When the district court denied Hamilton's motion to alter or amend the judgment and motion for new evidentiary hearing, the effect was to require Hamilton to file a subsequent petition for any additional relief sought. Hamilton now seeks to avoid the stringent law applicable to abusive and successive petitions by reopening habeas proceedings in the district court via Rule 60(b) even though an appeal is currently pending before the Ninth Circuit. By even entertaining that motion, the Ninth Circuit and district court sanction its use to expand the scope of a fully litigated federal petition. In so doing, the lower court creates the potential for the use of Rule 60 to avoid this Court's pronouncements concerning abuse of the writ.[7/] A prisoner would avoid the

---

7. Use of Rule 60(b) to reopen district court proceedings without a showing of cause and prejudice, or

necessity of showing cause and prejudice, or miscarriage of justice simply by the use of Rule 60. The Ninth Circuit should not have permitted Hamilton an opportunity to circumvent these basic and absolute prerequisites to additional habeas claims being raised.

Since being sentenced to death over a decade ago, Bernard Hamilton has enjoyed protracted delay while the district court repeatedly ordered him to exhaust and bring known claims. Hamilton expressly and personally waived known claims not raised in the district court proceedings despite repeated opportunities to bring his claims.

On October 17, 1989, Hamilton was put on notice to bring forward all known claims by petitioner's motion.

---

miscarriage of justice is being sanctioned by the Ninth Circuit in more than this case. (See, Carriger v. Lewis, ___ F.2d ___, Filed 7/28/92, 92 DAR 10417 at p. 10418 (9th Cir. 1992).)

(Neuschafer v. Whitley, 860 F.2d 1470, 1482 (9th Cir. 1988).) The district court granted the motion on March 16, 1990. On June 8, 1990, Hamilton's two habeas attorneys identified 38 issues and Hamilton was ordered to pursue all unexhausted claims in the state court, or those claims would be waived or abandoned. The district court's order expressly stated petitioner would "voluntarily, knowingly, and intelligently [have] waived and abandoned" all unexhausted claims not filed in state court and all exhausted claims not filed in federal court by October 22, 1990. All of the claims which are the ultimate basis for the Rule 60(b) motion were clearly known, or should have been known, to Hamilton before his amended petition was ultimately filed in federal court on October 22, 1990. Accordingly, the subject of Hamilton's 60(b) motion must be raised in a subsequent petition.

The Rule 60(b) motion is predicated on a claim that habeas counsel misinterpreted McCleskey v. Zant. The very basis of the motion serves to illustrate why the Rule 60(b) motion is a manipulative device. Mistake of habeas counsel cannot excuse the purposeful withholding of a known claim absent a showing of cause and prejudice by Hamilton. Hamilton has no right to counsel in his collateral attack on the state's judgment of conviction. (Coleman v. Thompson, 501 U.S. ___, 115 L.Ed.2d 640, 111 S.Ct. 2546 (1991); Pennsylvania v. Finley, 481 U.S. 551 (1987).) Accordingly, his counsel's purported mistake cannot serve as "cause" for his failure to bring his claims in a timely manner during proceedings on his "first" petition. Since it is obvious that Hamilton cannot clear the hump of cause and prejudice for a subsequent petition,

he attempts to manipulate inapplicable Federal Rules of Civil Procedure to achieve the desired delay.

If Hamilton is permitted to litigate his counsel's "mistake of fact" in the district court in the context of a Rule 60(b) motion, he is circumventing, and thereby eliminating, the requirement of cause and prejudice which applies in habeas corpus litigation. Moreover, the prompt resolution of Hamilton's appeal is being delayed to accommodate a claim of mistake by counsel which is patently absurd. Hamilton and his counsel were repeatedly warned that a failure to raise known claims would constitute a waiver of those claims. The issuance of McCleskey v. Zant merely served to confirm the propriety of the district court's repeated orders to exhaust and bring known claims or those claims would be waived.

Even if counsel actually misunderstood the holding in McCleskey, there is no explanation for counsel's failure to understand the repeated and clear orders of the district court.[8/] Indeed, the underpinnings of Hamilton's Rule 60(b) motion rests with the premise that habeas counsel believed it could ignore the repeated warnings and orders of the district court with impunity. Separate and apart from the holding in McCleskey, such disregard for the express orders of a court cannot be condoned or rewarded.

Permitting a Rule 60(b) motion to be entertained in the district court

---

8. The purported mistake of habeas counsel in understanding the effect of McCleskey also suggests that McCleskey represents some unanticipated new development in the law. To the contrary, the Ninth Circuit has concluded that McCleskey is not a new rule of law subject solely to prospective application. McCleskey applies retroactively. (Harris v. Vasquez, 949 F.2d 1497 (9th Cir. 1991).)

has the effect of eliminating the applicable habeas rules and decisions of this Court pertaining to abuse of the writ. This Court should not permit the Ninth Circuit to allow an end run around the habeas corpus procedures which safeguard the states from endless litigation and the attendant absence of finality in their judgments.

B. The Remand for a Rule 60(b) Motion is Inconsistent With the Prompt Resolution of Hamilton's Appeal

This Court has explicitly stated a rule that whenever there is a stay in effect against a state enforcing a judgment of death, the federal courts have a "duty to take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all the issues presented in the case." (In re Blodgett, 502 U.S. ___, 116 L.Ed.2d 669, 112 S.Ct.

674 (1992).) The remand by the Ninth Circuit is unrelated to the court's consideration of the issues presented in Hamilton's appeal. Indeed, the remand affords Hamilton an opportunity to improperly expand the issues in the appeal.

Resolution of Hamilton's appeal should not be delayed in order to permit him to pursue additional claims in the district court. (In re Blodgett, supra.) An appellate court's effort to await combined consideration of a continual stream of litigation from a condemned prisoner invariably results in prejudice to the state from protracted delay. (See, In re Blodgett, supra, 116 L.Ed.2d. at p. 674.)

This Court has stated with unmistakable clarity that adherence to its decision in McCleskey v. Zant and prompt enforcement by the district court and

courts of appeal of that decision, will obviate in many cases the basis for the Ninth Circuit's perceived need to accommodate multiple filings. (In re Blodgett, supra, 116 L.Ed.2d at p. 674.) Similarly, adherence to the decision in McCleskey by the Ninth Circuit would necessarily obviate the need to accommodate Hamilton's Rule 60(b) motion through a remand to the district court.

Although the remand from the Ninth Circuit was limited, and the appeal briefing has been ordered to proceed as scheduled, the delay attendant with the remand is undeniable. As the order of remand provides:

> ". . . The district court shall keep this court advised on an ongoing basis as to the hearing schedule it sets and any actions it takes on the motion."
>
> ". . . Depending upon the action taken by the district court in respect to the 60(b) motion, this court may make further orders that might take the form of a full remand, a further briefing order, or a

> combination. This court in this appeal will provide whatever opportunity is necessary to all parties to respond to the district court's actions on the 60(b) motion." (Appendix B, emphasis added.)

The remand necessarily entails briefing, motions and argument before the district court on the Rule 60(b) motion. It may entail the taking of evidence. Invariably, Hamilton's appeal will be delayed, despite completion of appellate briefing by the parties, due to the necessity of resolving the 60(b) motion in the district court. Indeed, no time constraints for consideration of the Rule 60(b) motion are contained in the Ninth Circuit's limited remand. The prompt resolution of Hamilton's appeal has now taken a back seat to the litigation of a motion which should not even be entertained inasmuch as it is totally inconsistent with Rule 11 of the Rules Governing 2254 Proceedings and this

Court's decisions in McCleskey and Blodgett.

The Ninth Circuit order permitting a Rule 60(b) motion in this matter violates both the letter and spirit of the law and is unmistakably contrary to both McCleskey and Blodgett.

Hamilton has had his proverbial day in court for well over a decade now. From the time of his arrest he has engaged in delay tactics. Indeed, the district court, after hearing witnesses during the evidentiary hearing, observed the following about Hamilton's pre-trial requests:

> "[T]he court is left with the inescapable conclusion that [Hamilton] was using every tactic available to him to create delay." (ER 171.)

Hamilton is still bent on delay. At this point, delay is through deliberate piecemeal litigation. The Ninth Circuit has cleared the path for needless delay.

Absent intervention by this Court, Hamilton's appeal will ping-pong between the district court and the appellate court, one issue at a time for the remainder of his natural life.

If this Court fails to act, the Ninth Circuit remand order will serve as a blueprint for the circumvention of this Court's express and repeated holdings condemning piecemeal litigation and undue delay in capital habeas litigation.

C. This Court is Empowered to Grant Petitioner Relief

This Court is empowered to issue writs of mandamus and prohibition to inferior courts pursuant to section 1651 of Title 28 of the United States Code, i.e. the All Writs Act. While Rule 20.1 of the United States Supreme Court Rules cautions that issuance of the writ is a matter of "sound discretion sparingly exercised," the writ may be issued to

secure justice in the absence of any other adequate remedy. (Maryland v. Soper (No. 1), 270 U.S. 9, 29, (1926).)

The authority of this Court to exercise mandamus extends to those cases that are within its appellate jurisdiction, despite the fact no appeal has yet been perfected. (Roche v. Evaporated Milk Assn., 319 U.S. 21, 25 (1943); F.T.C. v. Dean Foods Co., 384 U.S. 597, 603 (1966).) Mandamus may not be used as a substitute for an appeal. (Kerr v. United States Ct. for N.Dist. of Cal., 426 U.S. 394, 403 (1976).)

Mandamus is appropriate both to confine an inferior court to the lawful exercise of its prescribed jurisdiction and to compel the court to exercise its authority when it has a duty to do so. (Roche v. Evaporated Milk Assn., supra, 319 U.S. at 26; Will v. Calvert Fire Ins. Co., 437 U.S. 655, 661 (1978).) The party

seeking mandamus must show that the right to issuance of the writ is "clear and indisputable." (Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384 (1953); Kerr v. United States District Court for N.Dist. of Cal., supra, 426 U.S. at 403.)

Petitioners have met these criteria for issuance of a writ of mandamus to the Ninth Circuit. The Ninth Circuits remand in the midst of an appeal to permit Hamilton to bring a motion with the effect of reopening proceedings before the district court and circumventing habeas corpus law governing abuse of the writ presents an exceptional circumstance and merits relief. This Court offers the only available forum to redress the abuse of discretion by the Ninth Circuit. (Supreme Court Rule 20.1.)

/

/

/

D. The State Has No Other Adequate Remedy Available to Redress the Appellate Court's Jurisdictional Error

The State has a compelling interest in the finality of habeas corpus litigation. Permitting litigation in the district court during the pendency of Hamilton's appeal for the purpose of circumventing the applicable restrictions on abuse of the writ denies the State's rights which cannot be adequately redressed after the burden of litigating waived claims.

An extraordinary writ from this Court is the sole means of preventing a remand for a manipulative and inappropriate mid-appeal motion in the district court with the attendant waste of prosecutorial and judicial resources, and delay in a capital case. During the pendency of Hamilton's appeal, there is no

final decision which would permit petitioners to seek review by certiorari.

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

CONCLUSION

For the reasons set forth above, Petitioners respectfully request this Court grant a Writ of Mandamus to the United States Court of Appeals for the Ninth Circuit, (Circuit Judges Schroeder, Fletcher and Trott) and a writ of prohibition to the district court (Judge Rudi Brewster).

DATED this 7th day of August, 1992.

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General
of the State of California

GEORGE WILLIAMSON, Chief Assistant
Attorney General

GARY W. SCHONS, Senior Assistant
Attorney General

LOUIS R. HANOIAN
Supervising Deputy Attorney General

HOLLY D. WILKENS,
Deputy Attorney General

Pat Zaharopoulos

PAT ZAHAROPOULOS,
Supervising Deputy Attorney General

Attorneys for Petitioner

AFFIDAVIT OF SERVICE BY MAIL

Attorney: No: 92-___

October Term, 1992

DANIEL E. LUNGREN
Attorney General of
the State of California
PAT ZAHAROPOULOS
Supervising Deputy Attorney General
110 West A Street, Suite 700
San Diego, California 92101

In re DANIEL VASQUEZ,
Warden of San Quentin
Prison and
DANIEL E. LUNGREN,
Attorney General of the
State of California

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within PETITION FOR WRIT OF MANDAMUS AND APPENDICES as follows: To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

Wendy Peoples
Staff Attorney
California Appellate Project
One Ecker Place, 4th Floor
San Francisco, CA 94105

Peter Benzian
Attorney at Law
701 B Street, Ste. 2100
San Diego, CA 92101

Richard Camino
Attorney at Law
17541 East 17th Street
Second Floor
Tustin, CA 92680

Hon. Rudi M. Brewster, Judge
United States District Court
940 Front Street
San Diego, CA 92189

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 10th day of August 1992.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, August 10, 1992

Robin L. Dunham
ROBIN L. DUNHAM

Subscribed and sworn to before me
this 10th day of August, 1992.

Anne Marie Buford
Notary Public in and for said County and State

ANNE MARIE BUFORD

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
AUG 7 1992
OFFICE OF THE CLERK

92-265

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, ____

In re DANIEL VASQUEZ,
Warden of San Quentin
Prison and
DANIEL E. LUNGREN,
Attorney General of the
State of California

APPENDICIES TO PETITION FOR
WRIT OF MANDAMUS

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON, Chief Assistant
Attorney General
GARY W. SCHONS, Senior Assistant
Attorney General
LOUIS R. HANOIAN
Deputy Attorney General
HOLLY D. WILKENS,
Deputy Attorney General
PAT ZAHAROPOULOS,
Supervising Deputy Attorney General

110 West A Street, Suite 700
San Diego, CA 92101
Telephone: (619) 237-7857

Attorneys for Petitioner

TABLE OF CONTENTS

APPENDIX A

United States District Court, Southern District, Order Denying Petitions for Writ of Habeas Corpus; Findings of Fact and Conclusions of Law A-1 - A-164

APPENDIX B

United States Court of Appeal for the Ninth Circuit Order A-166 - A-168

APPENDIX C

United States District Court, Southern District, Abandonment of Known Habeas Corpus Claims A-170 - A-171

APPENDIX D

United States District Court, Southern District, Order re Exhaustion of Claims and Waiver/Abandonment of Unasserted Claims A-173 - A-178

APPENDIX E

United States District Court, Southern District, Evidentiary Hearing Transcript A-180 - A-184

APPENDIX F

United States District Court, Southern District, Order Denying Petitioner's Motion to Relieve Counsel; Denying Petitioner's Request for a Subpoena; Denying Peititoner's Motion to Strike Testimony; Denying Petitioner's Motion for Leave to File a Motion for Summary Judgment; Denying Petitioner's Application for Stay of Proceedings A-186 - A-197

APPENDIX G

United States District Court, Southern District, Order Denying Petitioner's Motion to Alter or Amend the Judgment and/or for New Evidentiary Hearing A-199 - A-200

APPENDIX H

United States District Court, Southern District, Order Stating Willingness to Entertain Rule 60(b) Motion A-202 - A-204

APPENDIX I

United States District Court, Southern District, Order Setting Briefing Schedule for Petitioner's Motions for Reconsideration and Leave to File Amended Petition A-206 - A-207

APPENDIX J

United States Court of Appeal
for the Ninth Circuit, Order A-209

APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BERNARD LEE HAMILTON, Petitioner, vs. DANIEL VASQUEZ, Warden of San Quentin and DANIEL LUNGREN, Attorney General of the State of California, Respondents.	Civil No. 86-2102-B Consolidated with Civil No. 90-0291-B ORDER DENYING PETITIONS FOR WRIT OF HABEAS CORPUS; FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon remand from the Ninth Circuit Court of Appeals, and after reviewing the entire record and conducting an evidentiary hearing, it is hereby ordered that the amended and consolidated petitions for writ of habeas corpus are denied.

I. STATEMENT OF THE CASE

On March 2, 1981, petitioner was sentenced to death for the murder of

Eleanor Buchanan.[1] On direct appeal, and upon remand from the United States Supreme Court, the California Supreme Court affirmed the judgment of death. People v. Hamilton, 45 Cal.3d 351 (1988) (Hamilton II), cert. denied, 488 U.S. 1047 (1989).

A. Federal Habeas Petitions

Through March, 1990, petitioner filed five separate petitions for writ of habeas corpus in federal court, raising exhausted, unexhausted, and repetitive claims.

1. Petition Number One: 86-0809-T

In his first petition, filed on April 2, 1986, petitioner raised claims relating to ineffective assistance of counsel,

---

1. The basic factual circumstances of the crime and the case against petitioner are described in People v. Hamilton, 41 Cal.3d 408, 413-19 (1985) (Hamilton I), vacated, 478 U.S. 1017 (1986). Those facts which are relevant to this court's analysis of petitioner's specific habeas claims are set out below as Findings of Fact.

denial of the right to self-representation, and denial of due process. The district court denied the petition on the merits on August 26, 1986. On appeal, the Ninth Circuit vacated the judgment as premature because petitioner had not exhausted state remedies. The district court was instructed to dismiss the petition without prejudice to refiling the claims following exhaustion, which it did on September 30, 1987.

2. Petition Number Two: 86-2101-B

The second petition, filed on October 9, 1986, charged that the shackling of petitioner at trial was unconstitutional. This court denied the petition on the merits on November 19, 1987. The Ninth Circuit remanded the case for further proceedings on August 23, 1989, instructing the court to examine the entire trial court record. Hamilton v.

Vasquez, 882 F.2d 1469, 1473 (9th Cir. 1989). This petition is resolved in this order.

3. Petition Number Three: 88-1148-B

The third petition raised the same issues asserted and dismissed without prejudice in 86-0809-T. This court dismissed the petition on August 31, 1988. On September 7, 1990, the Ninth Circuit dismissed petitioner's appeal, finding it moot in light of the previous ruling in Hamilton v. Vasquez, 882 F.2d 1469 (9th Cir. 1989).

4. Petition Number Four: 89-0993-B

The fourth petition was filed on June 20, 1989, in the Norther District of California. This petition raised claims relating to access to the prison law library, denial of effective assistance of counsel, denial of a fair trial, and

denial of due process. Upon transfer to this district, the petition was dismissed on July 19, 1989, as this court concluded that the asserted grounds for relief "either have been or should have been presented by previous petitions . . . ." See Order, July 19, 1989.

5. Petition Number Five: 90-0291-B

The fifth petition states the same allegations contained in the first and third petitions, and was amended on October 18, 1990. This petition has been consolidated with 86-2101-B and is resolved by this order.

B. Consolidation of Federal Petitions

On February 26, 1990, upon motion of respondent and after remand of 86-2101-B, this court ordered petitioner to inform the court within ninety days of any and all additional habeas claims of which he

was aware. See Order, March 6, 1990. In response to this order, on June 8, 1990 petitioner filed a list of 36 potential claims, including claims which had been raised in earlier state and federal petitions. Petitioner conceded that many of the claims identified in his response were unexhausted pursuant to Rose v. Lundy, 455 U.S. 590 (1982).

On June 8, 1990, in order to allow petitioner to bring all appropriate claims in federal court at one time, this court consolidated the petitions pending in 86-2101-B and 90-0291-B, and permitted petitioner until August 8, 1990 to exhaust all unexhausted claims in state court. See Order, June 21, 1990. The consolidated cases were stayed to permit the exhaustion of any unexhausted claims in state court. Id. To the extent petitioner filed new claims in state court, this court indicated that it would

allow petitioner to amend his federal petition with respect to any newly exhausted claims upon completion of the state court proceedings. Id. On August 2, 1990, at petitioner's request, this court extended the time by which plaintiff was to file unexhausted claims in state court from August 8, 1990 to August 20, 1990. See Order, August 17, 1990.

On August 21, 1990, petitioner stated that he had failed to file any identified and unexhausted claims in state court in response to this court's instruction. However, instead of deeming all such claims waived, this court granted petitioner a further extension until October 22, 1990 to file any additional unexhausted state claims with the state court, and any additional exhausted

federal habeas claims in federal court. See Order, September 18, 1990.[2/]

Further, this court stated that if petitioner did seek to exhaust any claims in state court, consideration of the consolidated federal habeas corpus petitions would be stayed until all of the state claims were exhausted. Id. However, petitioner was explicitly notified that on October 22, 1990, without further court order, he would be deemed to have waived and abandoned any and all (1) habeas corpus claims not yet filed in state court; and (2) habeas corpus claims that have been exhausted in state court,

---

2. This order was incorrectly captioned with respect to the respondents' identity and the case number. The court issued a nunc pro tunc order on October 15, 1990, rectifying the error. Petitioner has never claimed any prejudice as a result of this error, and it is clear that all parties were aware that the order, although miscaptioned, applied to the pending consolidated cases.

but not yet filed in federal court. Id. at para. 3.

In ordering the above procedure, this court declared that it was seeking to avoid seriatim petitions and the delay which the filing of such petitions regularly introduces into the federal habeas system. At the same time, the court sought to ensure that petitioner was not forced to sacrifice any viable claims, and therefore petitioner was afforded every opportunity to exhaust his state claims and consolidate his federal petition.[3/] See Neuschafer v. Whitley, 860 F.2d 1470, 1482 (9th Cir. 1988) (Alacron, J., concurring), cert. denied sub nom.

---

3. Cumulatively, petitioner has had nearly eight months, from February 26, 1990 through October 22, 1990, to exhaust, amend, and consolidate his claims. If at any time during that period petitioner has filed unexhausted claims in state court, this court, as previously stated, would have stayed the federal proceedings until such claims were exhausted.

Demosthenes v. Neuschafer, 111 S.Ct. 1454 (1991).

On October 18, 1990, petitioner, acting on his own behalf, filed an amendment to his previously filed petition in Case No. 90-0291.[4/] On October 22, 1990, petitioner's appointed counsel filed an amended consolidated petition for writ of habeas corpus, encompassing numerous claims raised in the earlier petitions. Neither petitioner nor his counsel filed any unexhausted claims with the state court. By order dated November 21, 1990, this court accepted both documents as timely, and ruled that petitioner had now voluntarily, knowingly, and intentionally

---

4. Under the circumstances of this case, the court determined that it would be appropriate to allow petitioner to maintain an in propria persona role even though he has been represented throughout the proceedings by competent appointed counsel. The court's rationale in this regard is discussed below in Section X, Findings of Fact 124-26.

waived and abandoned any and all habeas claims not yet filed in state court, and any exhausted claims not yet filed in federal court, in accordance with this court's order of September 18, 1990.

After respondents answered the petitions and petitioner and his counsel filed their respective traverses, this court conducted a three week evidentiary hearing on all appropriate claims asserted by petitioner. Petitioner was transported to this court from San Quentin, was allowed to confer regularly with counsel throughout the evidentiary hearing, and testified at length during said hearing. At the conclusion of the hearing, both sides waived oral closing argument, choosing instead to file post-hearing briefs.

Upon careful consideration of the amended and consolidated petitions, the entire trial record, the evidence received

during the evidentiary hearing, and the post-hearing briefs, this court now enters the following findings of fact and conclusions of law.

II. THE SHACKLING OF PETITIONER AT TRIAL

A. Findings of Fact

1. On Thursday, September 18, 1980, prior to the start of trial, petitioner's trial counsel, Thomas Ryan, informed Judge Gill in a closed hearing that the had requested that petitioner be placed in restraints by courthouse security personnel. 21 R.T. 154.[5] Petitioner was present in restraints. In explaining this request, Ryan informed the court of two separate incidents in which

---

5. R.T. refers to the transcript prepared below during petitioner's trial proceedings, and P.H.T. refers to the transcript of the preliminary hearing. E.H. refers to transcripts of the evidentiary hearing conducted by this court. Volumes within the R.T. and P.H.T. series are identified by cardinal numbers, and volumes within the E.H. series are identified by roman numerals.

petitioner had acted violently towards members of his defense staff. Id. at 157.

2. The first such incident occurred on Sunday, September 7, 1980, when petitioner attacked Patricia Robinson, who had been retained by Ryan to assist with jury selection. Id. The attack occurred in the interview room in the jail, while Robinson was meeting with petitioner. Id. at 157. During the hearing on September 18, 1980, Robinson stated that "it was a physical attack on me . . . ." Id. at 162. Robinson noted that she believed the purpose of the attack was "to stall the trial . . . and to provide some excuse so that he would not have to assume responsibility of being in attendance at trial." Id. In stating her beliefs as to petitioner's motivations, Robinson did not downplay or seek to minimize the actual physical nature of the attack.

3. The second incident related to the court occurred on Wednesday, September 17, 1980, when Ryan met with petitioner in the interview room at the jail. Id. at 158. Petitioner handed Ryan a letter, and while Ryan was putting the letter into his briefcase, petitioner punched Ryan in the face, knocking him to the floor. Id. With Ryan on the ground, petitioner simply left the room. Id.

4. In addition to the two incidents described above, Ryan also informed Judge Gill on September 18, 1980, of his belief "that [petitioner] would disrupt the proceedings not only in the jail as he did by hitting me, but that he would disrupt the proceedings in the trial court by either hitting me or some member of the staff or judge . . . ." Id. at 159.

5. Petitioner was allowed to relate his version of the subject incidents. Petitioner claimed that he was not seeking to delay the trial, but had merely grown frustrated with what he perceived to be the deteriorating attorney-client relationship between himself, Ryan, and co-counsel Vivian Camberg. Id. at 163-65. Petitioner did not deny that the incidents took place.

6. At the conclusion of the hearing on September 18, 1980, Judge Gill took no explicit action, and did not order the shackles removed. Id. at 166-69.

7. On Wednesday, September 24, 1980, the parties appeared before the trial judge, the Honorable Franklin B. Orfield, to argue in limine motions. No jury was present. Because of the request made by Ryan on September 18, 1980, petitioner appeared in shackles. 72 R.T.

1. Upon petitioner's request to be unshackled so that he could handle his papers and take notes during the proceedings, Ryan again interjected his belief that the restraints should remain on petitioner. Id. at 1-2. In order to resolve this issue at the outset, the court reconvened the proceedings in camera and excluded the prosecutors. Id. at 2.

8. During the in camera hearing, Ryan informed the court of petitioner's earlier attacks, and his belief that petitioner "might very well impulsively, without thinking about it, either attack me, the court clerk, Miss Camberg, or anyone." Id. at 4.

9. The court allowed petitioner to state his position relative to shackles, and petitioner noted that he was co-counsel in this case, "not simply a defendant trying to take notes and stuff." Id. at 5. Petitioner further observed

that he had appeared in court on numerous occasions and had not acted inappropriately during any of those appearances. Id. In addition, petitioner stated his understanding that any in-court outbursts would be counterproductive to his defense. Id. at 6.

10. Although petitioner stated that he had not engaged in any prior courtroom outbursts, he was unable to state categorically that such outbursts might no occur in the future, observing, "As a matter of fact, why should there be [an outburst] unless Mr. Ryan is conducting himself in a manner that he realizes he shouldn't. Any why should he worry about that?" Id. at 5-6. Viewed in the context of petitioner's mounting frustration and apparent inability to control himself, this court finds that this statement constituted a veiled threat by petitioner to act violently in the

courtroom should his displeasure with Ryan reach a level known only to him.

11. After hearing from Ryan and petitioner, Judge Orfield ruled that petitioner would remain shackled. Id. at 9. Because of petitioner's potential for acting violently in court, Judge Orfield specifically stated that he was concerned with the safety of Ryan, Camberg, the court clerk, the court reporter, and any other officers of the court. Id. at 8.

12. On Thursday, October 2, 1980, Judge Orfield conducted a second in camera hearing on the shackling issue, during which Ryan requested that the shackles be removed from petitioner. Id. at 31. In making this request, Ryan stated that further conversations with petitioner and with other defense attorneys in the community had caused him

to reconsider his original request that petitioner be shackled. Id. at 30-31.

13. During the in camera hearing on October 2, 1980, Ryan also further expounded on his reasons for initially requesting that petitioner be shackled, informing Judge Orfield for the first time that Robinson had related to Ryan statements by petitioner indicating that "he would disrupt the trial; that he would make an attack on either myself or the bailiff, or perhaps even the judge." Id. at 32.

14. As an alternative to shackling, Ryan informed the court "that there are knee-type restraints that can be worn under Mr. Hamilton's trousers that would not be apparent, that would provide some security." Id. at 34.

15. In considering the request that petitioner be unshackled in court, Judge Orfield ordered bailiff

Andrus to investigate with jail authorities "if there is any reason that they know of why, from a security standpoint, we shouldn't release the shackles, and if there is not, I will order that they be released." Id. at 36. As this passage indicates, petitioner was put on notice by Judge Orfield that his general demeanor, both in and out of court, would be important in determining the security risk posed by petitioner while in court. In other words, this court finds that petitioner figuratively possessed the key to the shackles, and was aware that he controlled his own destiny relative to shackling.

16. Approximately thirty minutes later, Judge Orfield announced in open court that petitioner would be unshackled and would wear a leg brace. 26 R.T. 2. With petitioner in a restrictive leg brace under his trousers, jury

selection commenced later in the afternoon, and at the end of the day the court recessed until Monday, October 6, 1980. Up to this point, petitioner had never been seen by an prospective jurors in any form of restraint.

17. On Monday, October 6, 1980, Ryan interrupted jury selection to inform the court, out of the hearing of the jury, that petitioner "would rather have the leg irons than the knee brace," because the brace had allegedly become painful. 27 R.T. 98. According to petitioner, the problem with the knee brace was "not that it's too tight, it's just the position of it, it's bearing up into my nerves in my leg and it's more or less cutting off the circulation or cutting off that nerve, period." Id. at pp. 99-100. Petitioner explained to the court that he had previously received

medical treatment for nerve problems in his legs. Id. at 99.

18. Upon receiving petitioner's complaint, Judge Orfield inquired as to the availability of any other type of leg brace. Id. at 100. According to the bailiff, "there was one other type but that is not available." Id. Petitioner again stated his willingness to proceed in leg chains rather than the brace. Id.

19. After Judge Orfield requested and reviewed California authority on the shackling issue, he concluded that "under the circumstances" petitioner "should be afforded an opportunity to start the trial without restraints . . . ." Id. at 127. After this ruling, the court proceeded with jury selection on October 6 and 7, 1980, with petitioner present and completely unrestrained.

20. On the morning of Wednesday, October 8, 1980, an incident occurred at the jail which renewed the court's concerns with respect to courtroom security. Upon learning of the incident, Judge Orfield immediately conducted a hearing outside the presence of the prospective jurors. 29 R.T. 374.

21. During the hearing on October 8, 1980, Deputy Christiansen testified that when he arrived at the jail at 7:45 a.m., petitioner had not been "brought down" for transport to court. Id. at 375. In his own testimony during this hearing, petitioner conceded that he had not responded with Deputy Scully twice tried to wake him so that he could prepare for court. Id. at 393-94. Instead, after Scully's second attempt, petitioner asked Scully to check his file to determine if the file contained a written agreement between the court and Captain Nichols as

to special wake-up arrangements for petitioner. Id. at 394.

22. Deputy Christiansen testified that he had heard from several other deputies that petitioner "feels he has this agreement" pursuant to which he is to be "brought down" only between 7:30 a.m. and 8:00 a.m., even though "most people are generally brought down at a quarter after 6:00 in the morning." Id. at 375.

23. On the morning of October 8, 1980, Deputy Christiansen checked petitioner's file and found no such agreement or other reference to special arrangements. Id. at 376.

24. After confirming that there was no such agreement, Deputy Christiansen, accompanied by Deputies Hansen and Wilderman, went to petitioner's cell, opened it, and ordered petitioner to get up for court. Id. at 376. Petitioner

did not respond, except to roll over. Id. at 377. In an effort to awaken petitioner, the deputies removed his blanket, "at which time he jumped to his feet, clenched both fists and moved to the back of the cell . . . ." Id. The deputies subdued petitioner, removed him from the cell, placed him against the external wall in a prone position, and shackled him. Id. As the deputies attempted to move defendant, "he continued to struggle, tried to break free . . . and spat in the face of Deputy Hansen." Id.

25. Throughout this incident, Deputy Christiansen testified that petitioner "continued a verbal onslaught the entire time, referring to the deputies as cowards for not removing the chains so he could fight one on one." Id.

26. At approximately 8:00 a.m., Sergeant Runyen arrived at the jail

control area, and observed the deputies "bringing Bernard Hamilton down in chains." Id. at 387. Sergeant Runyen testified that petitioner was wearing just his jail undershorts at this time. Id. Petitioner was placed in a holding tank and given his clothes to dress for court. Id. After petitioner had dressed, Sergeant Runyen opened the door to the holding tank and asked petitioner "what the problem was . . . ." Id. Petitioner complained that the deputies had mistreated him, and requested that he be allowed to return to his cell to "wash up for court." Id. at 388. Because petitioner had already been afforded "ample time" to get ready for court, but had voluntarily chosen to stay in bed, this request was refused. Id. Upon Runyen's refusal, petitioner undressed, and he was transported to court in a blanket and undershorts. Id. Petitioner

was not offensive towards Runyen during this conversation. Id.

27. During cross-examination by Ryan, neither Deputy Christiansen nor Sergeant Runyen deviated from the version of events described above. Id. at 381-386, 388.

28. Petitioner testified that Deputy Christiansen harbored personal animosity towards him, which had resulted in several previous confrontations. Id. at 390. Petitioner disputed Deputy's Christiansen's version of the incident in the cell, and claimed that he was roughly snatched out of bed, slammed against the wall, and handcuffed, causing him to suffer a split lip and a cut on his wrist. Id. at 395.

29. Based on petitioner's testimony before Judge Orfield and the testimony received at the evidentiary hearing, this court finds petitioner's

version of events incredible and unworthy of belief. According to Robinson, petitioner had previously indicated his intent to prevent the trial from going forward, even if it required an attack on the jail deputies. See IX E.H. 49-50. Robinson testified that petitioner had explicitly stated prior to his incident that "[h]e wasn't going to come down for a particular court hearing. If he had to fight with the guards, the guards would not be able to make him come down to appear in court for a particular hearing." Id.[6/]

30. After hearing testimony on October 8, 1980, Judge Orfield again expressed his overriding

---

6. This court makes no finding concerning whether petitioner may have staged the October 8 incident in order to delay the trial and/or create an appellate issue by getting himself reshackled. Whatever petitioner's motivation, this court finds only that the attack occurred at petitioner's instigation.

concern with the safety of the individuals working in the courtroom. Id. at 403.

31. Judge Orfield explicitly recognized "a pattern of increased agitation on the part of the defendant." Id. at 404. Further, Judge Orfield found that petitioner "has defied all authority and I think it is just a matter of time before he would begin to defy all authority here in the courtroom." Id.

32. In considering whether to reshackle petitioner after the attack on October 8, 1980, Judge Orfield also had "in mind" the prior attacks on Ryan and Robinson, III E.H. 14, as well as petitioner's threats to Robinson to disrupt the trial, id. at 15.

33. In addition, Judge Orfield considered petitioner's general demeanor in court, and found him to "be an angry individual." Id. at 16. Judge

Orfield was concerned that petitioner "was on the edge of losing control of himself at any time." Id.

34. As described above in Findings of Fact 17-18, the leg brace had already been rejected as a restraint option due to petitioner's claim of discomfort and the unavailability of any other type of brace. Judge Orfield also considered, and rejected, the possibility of counteracting petitioner's potential for violence by increasing the number of bailiffs around petitioner to three. Id. at 17. This alternative was rejected because Judge Orfield believed "that it would be just as bad for that to occur as to have him in shackles," and because Judge Orfield was concerned that additional bailiffs could not adequately control petitioner should he act out "in a very forceful and sudden manner." Id. at 17-18.

35. As a third alternative, Judge Orfield considering removing petitioner from the courtroom during trial, but this alternative was rejected as impossible due to petitioner's status as co-counsel. Id. at 19.

36. With no alternative available, and because of his extreme concern with the safety of court personnel, Judge Orfield ordered petitioner shackled for trial. 29 R.T. 404.

37. During the afternoon of Wednesday, October 8, 1980, jury selection resumed with petitioner in shackles. This was the first time petitioner appeared before any juror in shackles. As jury selection proceeded, Judge Orfield instructed each individual juror that he or she should draw no inference from the fact that the petitioner was shackled, and none of the

jurors expressed any prejudice towards petitioner as a result of the shackling. See e.g., 29 R.T. at 416, 432, 454. Petitioner participated in voir dire by questioning potential jurors directly. See e.g., 29 R.T. at 450.

38. After deciding that petitioner should be shackled, the court attempted to minimize the prejudicial effect of the shackling. The entire shackling mechanism worn by petitioner weighed approximately two pounds. X E.H. 107. Petitioner was always seated before the jury entered the courtroom, and the shackles were worn underneath his coat, as physically demonstrated during the evidentiary hearing. Id. at 101-02. However, because petitioner testified in his own defense, this Court finds that the jury was aware that petitioner was shackled.

39. The above findings of fact have been culled from the trial and evidentiary hearing transcripts. Upon review of said transcripts, and having made credibility determinations throughout the evidentiary hearing, this court concludes that said findings accurately describe the information available to Judge Orfield when he considered whether to shackle petitioner in front of the jury. In addition, and for the same reasons, this court concludes that the above findings accurately describe the factors and alternatives actually considered by Judge Orfield in deciding to shackle petitioner, as well as the prominence of the shackles from the jury's perspective.

B. Conclusions of Law

1. Although a criminal defendant generally has the right to appear before a jury free of shackles, the

trial court's decision to shackle a defendant is not per se unconstitutional. Spain v. Rushen, 883 F.2d 712, 715 (9th Cir. 1989), cert. denied, 110 S.Ct. 1937 (1990). It is within the trial court's discretion to use shackles or other security measures "when circumstances dictate," Wilson v. McCarthy, 770 F.2d 1482, 1484 (9th Cir. 1985), although this "must be limited to cases urgently demanding that action." Tyars v. Finner, 709 F.2d 1274, 1284 (9th Cir. 1983). The habeas court must review the trial judge's decision to use shackles for an abuse of discretion. Spain, 883 F.2d 716.

2. The trial court must take two steps prior to shackling a defendant. Jones v. Meyer, 899 F.2d 883, 884-85 (9th Cir. 1990), cert. denied, 111 S.Ct. 95 (1990). "First the court must be persuaded by compelling circumstances `that some measure was needed to maintain

the security of the courtroom.'" Id. at 885 (quoting Spain, 883 F.2d at 720). "Second, the court must 'pursue less restrictive alternatives before imposing physical restraints.'" Jones, 899 F.2d at 885 (quoting Spain, 883 F.2d at 721).

3. To satisfy the second requirement, the trial court must first "assess the extent of the limitations that would be present if shackles were applied." Spain, 883 F.2d at 721. "These limitations include the following: (1) shackles may reverse the presumption of innocence by causing jury prejudice; (2) shackles may impair the defendant's mental faculties; (3) shackles may impede communication between the defendant and counsel; (4) shackles may detract from the decorum of the judicial proceeding; and (5) shackles may cause pain to the defendant." Jones, 899 F.2d at 885. "After considering these factors, the

trial judge 'must weigh the benefits and [these] burdens of shackling against other possible alternatives.'" Id. (quoting Spain, 883 F.2d at 721).

4. With respect to the first step prescribed in Spain, a number of factors, not just any single one, provided Judge Orfield with ample justification for implementing some type of security measure to protect courtroom personnel, defense counsel, and himself. Petitioner's attacks on Ryan and Robinson, combined with his outburst in jail on October 8, 1980, demonstrated petitioner's propensity towards violence and his inability to control himself.

5. Although these incidents occurred out of court, Judge Orfield also had every reason to believe that petitioner was likely to engage in violent activity in court, as evidenced by the following factors: (1) petitioner's

veiled threat during the in camera hearing on September 24, 1980; (2) Ryan's revelation on October 2, 1980, indicating to Judge Orfield that petitioner had stated to Robinson that he would disrupt the court proceedings by attacking counsel, the bailiff, or the judge himself; and (3) petitioner's general demeanor while before Judge Orfield. Because petitioner's propensity towards violence was well-documented, and because there was substantial evidence indicating that this propensity might be carried out in court, this court concludes that compelling circumstances existed which mandated the use of security measures.

6. In assessing the second step prescribed by Spain, the evidence indicates that Judge Orfield pursued alternatives prior to shackling defendant. In fact, Judge Orfield employed the leg brace alternative until petitioner's

complaints rendered the use of the brace impossible. Prior to shackling petitioner on October 8, 1980, Judge Orfield explored two other alternatives, but dismissed them as impracticable under the circumstances. With no other alternatives available, it is clear that the relative benefits and burdens of shackling petitioner mandated the decision eventually reached by Judge Orfield.

7. For these reasons, this court concludes that it was not an abuse of discretion for the trial court to order petitioner shackled under the circumstances.

III. INEFFECTIVE ASSISTANCE OF COUNSEL: SHACKLING REQUESTS

A. Findings of Fact

40. The court hereby incorporates by reference Findings of Fact 1-39 above. Although the above findings represent the information available to

Judge Orfield with respect to the shackling of defendant, they are also relevant to the circumstances surrounding Ryan's decision to request that petitioner be shackled on September 18 and 24, 1980. To the extent the above findings do not fully portray the circumstances surrounding Ryan's request with respect to Ryan's thought processes and the attorney-client relationship, they are supplemented below.

41. During the in camera hearings before Judge Gill on September 18, 1980, and Judge Orfield on September 24, 1980, neither Ryan nor Robinson gave a detailed account of the attack on Robinson. 21 R.T. 157, 162; 72 R.T. 3-4. However, the details of that attack were known to Ryan when he requested that petitioner be shackled, as Robinson had described the ferocity of the attack to him shortly after it occurred, at which

time she appeared terrified. V E.H. 107; VII E.H. 60. Robinson told Ryan that she had been forced to bite petitioner through the tongue. V E.H. 107. When Ryan asked petitioner about the incident, petitioner confirmed that he had attacked Robinson. V E.H. 109.

42. There is no credible evidence before the court indicating that this attack constituted anything less than a violent sexual assault. Robinson testified that when she attempted to leave the jail interview room after meeting with petitioner, petitioner blocked her path. VIII E.H. at 137. Petitioner grabbed Robinson, placed his hands around her neck, and began choking her. Id. at 137-40. Eventually, petitioner pinned Robinson's hands behind her back, and only when Robinson drew blood by biting petitioner's tongue did the attack cease. Id. at 140. Robinson characterized the

attack as "life-threatening." Id. at 149. The court finds Robinson's testimony to be credible and consistent with the type of attack that would have moved Ryan to approach Judge Gill with the shackling request.[7]

43. In addition to the physical assaults on Robinson and himself and the general threat of disruption, Ryan also considered, but did not reveal to the court, petitioner's ongoing threats "to get" particular witnesses, the bailiff, and the district attorney. V E.H. 126-29, 131, 135. Moreover, Ryan considered but did not reveal to the court,

---

7. Petitioner's attempts to downplay this incident are totally unpersuasive and incredible. In light of Robinson's testimony, the characterization of this incident as an awkward romantic endeavor is repugnant and wholly unbelievable. See Petitioner's Post-Hearing Brief at 87 ("Her testimony that Petitioner's tongue was biten (sic) as he was advancing towards her with his tongue out of his mouth speaks eloquently of the amorous intent.").

petitioner's earlier episodes of violence, as related by his former wife, various girlfriends, and as suggested by a then pending robbery case in which petitioner had allegedly beaten an elderly woman. VI E.H. 144.

44. Against this backdrop of violent behavior and potential danger, Ryan requested that petitioner be shackled on September 18 and 24, 1980. When Ryan initially requested that petitioner be placed in restraints, he informed Judge Gill that his principal concern was the detriment that petitioner would suffer if he acted violently in front of the jury. 21 R.T. 159. In requesting that the shackles remain on petitioner during the in camera hearing before Judge Orfield on September 24, 1980, Ryan again reiterated his concern with the effect any violent outburst by petitioner might have on the jury. 72 R.T. 3, 4-5. Specifically, Ryan

"was concerned about Mr. Hamilton attacking somebody at the courtroom, acting out, attacking either in the presence of the jury or in the presence of somebody else who would testify to the attack at a penalty phase trial." V E.H. 133.

45. From the initial request through the evidentiary hearing, Ryan has never deviated from his position that shackles were necessary primarily to prevent petitioner from hurting his own cause before the jury. Based upon the trial record and a careful evaluation of Ryan's testimony during the evidentiary hearing, this court finds Ryan's position to be credible and truthful.

46. During the September 18, 1980 hearing, Ryan also alluded to his concern that petitioner's violent outbursts against Robinson and Ryan might later be used by petitioner to support a

collateral attack on Ryan's effectiveness, if Ryan did not reveal the incidents to the court. 21 R.T. 159-60; V E.H. 140.

47. During the hearings of September 18 and 24, 1980, Ryan never explicitly stated that his shackling request was motivated out of concern for his own safety or that his staff. However, his concern in his regard may be logically inferred from his comments, and this concern was certainly of substantial importance to Judge Orfield. 72 R.T. 8.

48. After the first request on September 18, 1980, Judge Gill asked Ryan whether he remained prepared to represent petitioner to the best of his ability. 21 R.T. 160. Noting that he had "given it a lot of thought," Ryan responded affirmatively, stating his belief that he could continue as lead counsel for the defense. Id. Ryan stated that he believed in petitioner's

innocence. Id. at 161. When the same question was put to Robinson by Judge Gill, she also responded affirmatively and stated that she too believed in petitioner's innocence. Id. at 162.

49. Ryan withdraw his shackling request on October 2, 1980, before petitioner ever appeared before the jury, and petitioner remained unshackled until October 8, 1980, when his jail outburst convinced Judge Orfield, over Ryan's objection, 29 R.T. 401, that petitioner should shackled during trial.

B. Conclusions of Law

8. In order to demonstrate unconstitutional ineffective assistance of counsel, a criminal defendant must satisfy two elements:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the

> defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland v. Washington, 466 U.S. 688, 687 (1984).

Importantly, the Court has held that "[j]udicial scrutiny of counsel's performance must be highly deferential," and the reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." Id. at 689.

9. The sixth amendment guarantees every criminal defendant the right to the assistance of counsel who is unhindered by conflicting interests. Holloway v. Arkansas, 435 U.S. 475, 482 (1978). "Although the issue of a conflict typically arises in a case involving joint representation, it also may arise when a client's interest conflicts with that of

his attorney. The same principles apply." United States v. Ellison, 798 F.2d 1102, 1107 (7th Cir. 1986), cert. denied, 479 U.S. 1038 (1987).

10. Where an alleged conflict of interest forms the basis of an ineffective assistance of counsel claim, the petitioner must demonstrate "that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" Strickland, 466 U.S. at 692 (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)). If petitioner makes this showing, then prejudice is presumed. Strickland, 466 U.S. at 692.

11. In requesting that petitioner be shackled, Ryan was not actively representing conflicting interests. Ryan has stated, and this court has found, that Ryan's paramount concern was the potential for violent

conduct in front of the jury. Because such conduct would maximally prejudice petitioner before the jury, Ryan acted in petitioner's best interests in requesting that petitioner be shackled, particularly since the jury would be instructed to disregard the restraints. The fact that Ryan may have harbored lesser concerns, including the safety of his staff and the potential for collateral legal attacks by petitioner, does not change this result.

12. Moreover, Ryan's request did not adversely affect his performance. Ryan never wavered from his conviction that petitioner was innocent, and he explicitly informed Judge Gill that he was prepared to carry on as lead defense counsel. There has been no showing by petitioner that Ryan's performance suffered because of his initial desire to have petitioner shackled.

13. Alternatively, even if the initial shackling request did constitute a conflict of interest between Ryan and petitioner, this court concludes that Ryan was ethically required as an officer of the court to act as he did under these circumstances. See ABA Code of Prof. Responsibility, DR 4-101(C)(3) (permitting an attorney to reveal "[t]he intention of his client to commit a crime and the information necessary to prevent the crime"); ABA Model Rules Prof. Conduct, Rule 1.6(b)(1) (attorney may reveal confidential information "to prevent the client from committing a criminal act . . . likely to result in imminent death or substantial bodily harm"). By informing the court of the situation and requesting that petitioner be shackled, Ryan was merely refusing to be a silent partner in any future violent outbursts. Because Ryan indicated that he

was able to continue to represent petitioner after he had fulfilled his ethical duty, the court was entitled to allow Ryan to continue as counsel. To hold otherwise would merely encourage counsel to shirk his or her ethical duties in order to avoid any subsequent conflict of interest charges.

14. For these reasons, the court concludes that petitioner has not met the standard articulated in Strickland for ineffective assistance of counsel claims based upon an alleged conflict of interest.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL; INVESTIGATION AND TRIAL PERFORMANCE

A. Decapitation

(a) Findings of Fact

50. During petitioner's trial, Dr. Frances Luibel, the pathologist who performed the autopsy on the body of Eleanore Buchanan, testified that he was

unable to state with certainty whether the victim's head and hands were removed ante-mortem or post-mortem. 42 R.T. 2337. However, Dr. Luibel did state his opinion that the victim was "probably dead" when her hands were cut off. Id. Moreover, Dr. Luibel had expressed his opinion to Ryan in a pre-trial interview that decapitation occurred post-mortem, VI E.H. 157, and an investigative report prepared by Detective Cellucci also indicated that Dr. Luibel at least initially believed that decapitation occurred post-mortem, Petitioner's Exh. 23, p. 5.

51. During the evidentiary hearing, Dr. Luibel again testified that while he believed that decapitation occurred post-mortem, he was unable to render this conclusion "with 100 percent certainty." I E.H. 68. Petitioner's expert witness, Dr. Hormoz Guard, testified that in his opinion decapitation

occurred post-mortem. Id. at 47. Dr. Guard did not qualify his opinion or otherwise express any uncertainty as to its validity. Id. at 59.

52. Respondents concede that Ryan neither argued post-mortem decapitation to the jury, nor attempted to prevent the prosecutor from arguing that decapitation may have occurred while the victim was alive.

(b) Conclusions of Law

15. Petitioner has not met his burden under either prong of Strickland with respect to the decapitation issue. Because Dr. Luibel, who performed the autopsy, has never been able to testify to a certainty that decapitation occurred post-mortem, it would have been impossible for Ryan to prevent the prosecutor from arguing that decapitation might have occurred ante-mortem, even if Ryan obtained and

introduced expert testimony consistent with that offered by Dr. Guard. A prosecutor may argue any inference which is supported by the evidence. See e.g., People v. Beivelman, 70 Cal.2d 60, 76-77 (1968), cert. denied sub nom. Anderson v. California, 406 U.S. 971 (1972).

16. Moreover, Ryan's decision not to press the decapitation issue in the defense case cannot be characterized as professionally unreasonable. Whether the victim was decapitated before or after death, the jury was confronted by a particularly gruesome crime. For Ryan to introduce evidence and/or argument concerning when the victim was decapitated might strike a reasonable juror as an effort to trivialize the heinous nature of the crime. Instead of benefitting petitioner, such argument might have prejudiced the jury against him. Therefore, petitioner

has demonstrated neither deficient performance nor prejudice in Ryan's treatment of the decapitation issue.

B. Blood on the Shoe

(a) Findings of Fact

53. The prosecution introduced into evidence petitioner's blood-stained shoe. Trial Exh. 24. Analysis of the blood smear on the shoe revealed that it matched the victim's blood type, and was different than petitioner's blood type. 51 R.T. 3112, 3114. The shoe and its blood stain constituted one of the prosecution's many important pieces of evidence. X E.H. 88.

54. During trial, the defense attempted to introduce a theory suggesting that the shoe might have been smeared with the victim's blood through contact with the van's blood stained carpet, as opposed to contact with the victim herself. 59 R.T. 3906. The

defense expert criminalist, V. Parker Bell, testified that the blood could have been transferred to shoe from the carpet. Id. However, Bell conceded on cross-examination that there were no blue fibers from the carpet present in the blood on the shoe. Id. On rebuttal, the prosecution recalled criminalist Brandon Armstrong, who also testified that the blood on the shoe contained no blue fibers. 60 R.T. 4017. Moreover, Armstrong testified "that if the shoe had rubbed onto a stained bloody carpet that was -- had that loose of a nap, . . . the fibers would have stuck to the shoe in the blood or would have been mixed in with the blood deposited on the shoe." Id. at 4018.

55. During the evidentiary hearing, Bell testified that he was never asked by Ryan to test whether the shoe could have been stained by coming into

contact with blood from the carpet. V E.H. 34-35. Bell proceeded to describe a test he performed at the request of petitioner's present counsel, in which he applied blood soaked carpet samples to a shoe in an attempt to determine whether fibers would necessarily be transferred to the shoe. Id. at 35-37. Based upon his experiment, Bell concluded that "it would be possible that the blood could have been applied to the shoe by coming in contact with the bloody carpet, without a transfer of carpet fibers." Id. at 38.

56. Bell's experiment was flawed in numerous respects. First, the carpeting used was not from the victim's van, but was carpet that Bell determined to be similar by "look and feel." V E.H. 56. Bell conceded that the samples he used "were somewhat different from the carpet in the van." Id. at 36. Moreover, the shoes used by Bell were different than

petitioner's blood-stained shoe. 9 R.T. 127. Finally, the blood used in the Bell experiment came from the blood bank and had been treated with anticoagulants, so that its clotting capability, consistency, drying time, and tackiness were all different than that of the fresh blood which stained petitioner's shoe. 9 R.T. 126-27.

57. During the evidentiary hearing, Armstrong testified that he remained of the opinion that the stain on the shoe did not come from the rug. II E.H. 22-23. Armstrong observed that "[t]he body, the clothing, virtually everything that came out of the van had fibers on it if it had been in contact with the carpet . . . ." Id. at 23. Armstrong further testified that Bell's recent experiment did not change his opinion in any way. IX E.H. 131.

58. The court finds that the net effect of the evidence adduced at the evidentiary hearing is no different than that produced at trial, even taking into account Bell's new experiment. This court finds that Bell's test is of no persuasive value, and even its admissibility is extremely doubtful.

(b) Conclusions of Law

17. Petitioner has not met his burden under either prong of Strickland with respect to the blood on the shoe. The court concludes that competent counsel would not be required to conduct further tests with respect to the source of the blood, if he had already secured an expert opinion supporting the theory that the blood could have come from the carpet, as Ryan had done.

18. Moreover, even had Ryan investigated and argued the issue in the manner now urged by petitioner, there

has been no showing whatsoever that the jury would not have chosen to believe that the blood was transferred to the shoe through direct contact with the victim. Therefore, petitioner has demonstrated neither deficient performance nor prejudice in Ryan's investigation of the blood on the shoe.

C. Transportation of the Victim's Body

(a) Findings of Fact

59. During trial, the prosecution argued that the victim's body was transported to Pine Valley by petitioner in the victim's van, where it was dumped by petitioner. 63 R.T. 4150-51. Specifically, the prosecution posited that the victim's body was transported in the back of the van, in the storage compartment under the rear seat. Id. This contention was supported by the location of a major blood stain in the

storage compartment, and the presence of blue carpet fibers on the victim's stomach and arm stumps. Id.

60. In response to this argument, Ryan vigorously argued that the body was not transported to Pine Valley in the van, but rather transported in another car driven by the true killer. Id. at 4210-11. Noting that there was no dispute that the body was transported after rigor mortis had set in, Ryan suggested that the body could not have been transported in the position in which it was eventually discovered. Id. at 4210. Moreover, Ryan noted the absence of blood anywhere else in the van. Id. at 4211. Finally, Ryan emphasized the presence of other tire tracks in the remote area where the body was dumped, which he opined "were left by the vehicle that dropped that body there." Id. Ryan concluded "that the body was not taken out there in that van." Id.

61. During the evidentiary hearing, petitioner attempted to demonstrate that the body could not have been transported in the manner theorized by the prosecution. Petitioner's criminalist Bell testified that it was unlikely, although not impossible, that the body could have been transported in the storage compartment, given the location of the spare tire in that compartment at the time of petitioner's arrest. V E.H. 45. However, Bell conceded on cross-examination that the spare tire was not secured in the storage compartment, but could be moved freely. Id. at 60.

62. Respondents submitted evidence indicating that the body could have been transported by petitioner in the storage compartment. Specifically, respondents presented photographs of a female agent positioned in the storage

compartment. IX E.H. 138-45; Exh. A-25. However, the positioning of the agent for the photographs did not take into account the location of the blood stain, the location of the spare tire, and the position of the victim. IX E.H. at 147-49.

63. Based upon the foregoing evidence, the court finds that the victim could have been transported in the van in the manner argued by the prosecution. On the other hand, competent defense counsel could argue that the evidence does not support the prosecution's theory, as Ryan did. The court finds that the additional evidence proffered at the evidentiary hearing did not resolve the issue and would only marginally have affected the ability of either side to make their respective arguments.

(b) Conclusions of Law

19. Petitioner has not met his burden under either prong of Strickland with respect to the transportation of the victim's body. Ryan's argument in response to the prosecution's theory on this issue constituted effective assistance of counsel. Moreover, there has been no showing by petitioner that any additional investigation of this issue would have significantly advanced the credibility of Ryan's argument in this regard, given the state of the evidence.

20. In addition, petitioner has made no showing of prejudice, given the evidence amassed against him on this issue and many others. As demonstrated at the evidentiary hearing, even with additional investigation Ryan could not have stopped the prosecution from arguing persuasively

that the body was transported to Pine Valley in the van. Therefore, petitioner has demonstrated neither deficient performance nor prejudice in Ryan's treatment of this issue.

D. Petitioner's Identification of the Victim

(a) Findings of Fact

64. Upon petitioner's arrest in Oklahoma in possession of the victim's van, San Diego Sheriff's detectives Norman Crawford and Joe Cellucci travelled to Oklahoma to interview petitioner concerning the murder. 49 R.T. 2841. Petitioner explained to Detective Crawford that he came into possession of the van lawfully after travelling with the victim and a man named Calvin Spencer (aka "Spider"). Id. at 2862. According to petitioner's story at the time, the victim and Spider let him take the van and the victim's credit cards

in Shreveport, Louisiana, because they had business to conduct and petitioner did not want to stay in Shreveport. Id. at 2857-58, 2880-81. Petitioner claimed that the victim and Spider had agreed to contact him at his cousin's home in Oklahoma City, Oklahoma, the very next day. Id. at 2858, 2862. In other words, petitioner disclaimed knowledge of any homicide and told Detective Crawford that the victim was alive and well. Id. at 2869-70.

65. In order to lend credibility to this version of events, petitioner positively identified the victim, his purported travelling companion, from a photograph offered by Detective Crawford. Id. at 2873. In addition, petitioner consistently referred to the victim as "Fran," which was her true nickname. Id. at 2871-2873, 2873. Finally, petitioner stated that "Fran" was wearing light colored jeans and carrying a

beige purse when petitioner was supposedly travelling with her and Spider. Id. at 2875-76. In fact, when the victim left her home on the night she was murdered, she was wearing tan jeans and carrying a tan purse. 41 R.T. 2151.

66. The evidence indicates that petitioner abandoned the "Spider" story sometime after the victim's headless and handless body was positively identified as Eleanor "Fran" Buchanan. Petitioner claims that he concocted the "Spider" theory in order to avoid being charged with the simple theft of the van. 54 R.T. 3481. Since abandoning the Spider story, petitioner has steadfastly claimed, throughout trial and this proceeding, that he stole the abandoned van but has never seen the victim alive or dead.

67. Petitioner's revision of his story necessarily brought into question his ability to identify the

victim, refer to her by her nickname, and describe her purse and pants during the interview with Detective Crawford. During trial, Ryan argued that petitioner "knew [the victim] through the purse that was in the van and the information that was contained therein," 54 R.T. 3393, and the jury received evidence supporting that theory. See e.g., 41 R.T. 2116-17. However, Ryan never put into evidence any plausible explanation for petitioner's ability to describe accurately the style and color of the victim's pants.

68. During his closing argument at trial, the prosecutor attacked petitioner's contention that he had never seen the victim, observing that petitioner identified the victim to Detective Crawford, as well as the style and color of her pants. 63 R.T. 4151-53. Ryan did not attempt to rebut this specific argument in his closing.

69. During the evidentiary hearing, petitioner stated that he was able to identify the victim because there were photographs of her in the tan purse that he found in the van, as well as papers indicating that the owner of the van was named "Fran." II E.H. 46-47. Petitioner further stated that he "came up with the idea of light pants because her purse was light." Id. at 46. Petitioner explained that he cannot be held accountable for the "coincidence" that the victim was in fact wearing light pants on the day she was murdered. Id. at 148.

70. Based upon the trial and evidentiary hearing transcripts, as well as this court's evaluation of petitioner's testimony, the court finds that petitioner's theory with respect to his knowledge of the victim's pants is wholly incredible. Petitioner's claim that he guessed the style and color of

pants from the color of the purse is unworthy of belief, and would not have had any beneficial impact on the jury. The court infers that Ryan did not present petitioner's theory to the jury because it was unbelievable and would have caused petitioner further prejudice by emphasizing the strength of the government's case in this regard.

(b) Conclusions of Law

21. Petitioner has not met his burden under either prong of Strickland with respect to his identification of the victim. The court concludes that Ryan acted competently when confronted by an extremely difficult situation. Although Ryan may not have fully responded to the prosecutor's closing argument on this issue, the evidence supporting the defense theory of identification was submitted to the jury. With respect to the discrete issue of the

pants, Ryan's failure to present a completely incredible story to the jury was a reasoned tactical decision and does not constitute deficient performance.

22. Moreover, even had Ryan adopted the strategy now urged by petitioner, there has been absolutely no showing of prejudice. On this issue the prosecution's case was extremely strong, and the evidence adduced at the evidentiary hearing would not have weakened the government's case in any respect. In other words, even after eleven years and with the benefit of hindsight, petitioner's present counsel have fared no better in mitigating the impact of petitioner's statements to Detective Crawford. Quite simply, it is doubtful even a miracle worker could have done so, and Stickland does not require defense counsel to be miracle workers. Therefore, petitioner has demonstrated

neither deficient performance nor prejudice in Ryan's argument concerning the identification of the victim.

E. Cumulative Impact of the Alleged Deficiencies

(a) Findings of Fact

71. Judge Orfield stated that the evidence of guilt in this case was "overwhelming," even though it was based upon circumstantial evidence. III E.H. 23. In addition, Judge Orfield opined that "Mr. Ryan did an excellent job in a most difficult case with a very, very difficult client." Id. at 21; see also 66 R.T. 4320 (statement to same effect by Judge Orfield at conclusion of guilt phase of trial, noting that "[i]t is almost as if Mr. Hamilton were attempting to sabotage his case.").

72. Moreover, the prosecutor in the case, Thomas McCardle, testified during the evidentiary hearing

that Ryan did "an amazing job in a case which seemed to me to be impossible for any defense attorney to win." IX E.H. 158. McCardle noted that Ryan was "hobbled greatly by the defendant's inability to keep his mouth shut, and the defendant's inability to refrain from taking positions in writing under oath and sometimes not under oath that put Mr. Ryan in an extremely difficult position." Id. at 159.

73. Based upon its own independent review of all of the evidence, and notwithstanding the contrary opinion of petitioner's expert witness, this court agrees with the conclusions reached by Judge Orfield and McCardle. The evidence amassed against petitioner was overwhelming. Reasonably interpreted, the evidence could only have supported a guilty verdict. Moveover, petitioner's own statements and letters contributed

substantially to his guilt, and persistently frustrated the efforts of Ryan to present the defense case.

(b) Conclusions of Law

23. This court has explicitly concluded that petitioner has not demonstrated ineffective assistance of counsel with respect to any of the individual attacks on Ryan's performance. Therefore, it is obvious that the cumulative impact on these non-deficiencies cannot constitute ineffective assistance under Stickland.

24. However, even if one or more of petitioner's challenges to Ryan's performance were viable, petitioner has still not demonstrated prejudice on a cumulative level. In other words, the strength of the prosecution's case is such that petitioner's tactical challenges, guided by hindsight, do not undermine this

court's confidence in the outcome of the trial.

25. Moreover, Ryan's decision not to argue lingering doubt at the penalty phase does not indicate incompetence, where the evidence arrayed against petitioner was so overwhelming that counsel could reasonably have concluded that the jury could not be persuaded to recognize any lingering doubt. Under these circumstances, reasonable counsel might choose tactically to emphasize other avenues in his or her mitigation strategy, as Ryan did here.

26. The law rightfully does not recognize the concept of ineffective assistance by the criminal defendant himself. Instead, the law is generally willing to allow a criminal defendant to aid the prosecution's case, whether such aid be rendered purposefully or inadvertently. Here, petitioner

rendered such aid consistently and to the prosecution's ultimate reward. Viewed in this light, petitioner's current attempts to challenge counsel's performance ring hollow, and reflect petitioner's persistent belief that he can blame others for those troubles which he brings upon himself. This court is not impressed by these attempts, and concludes with unequivocal certainty that petitioner received assistance of counsel that went far beyond the level guaranteed by the Constitution.

V. DENIAL OF PETITIONER'S ALLEGED REQUESTS FOR SELF-REPRESENTATION

A. Findings of Fact

74. After waiving extradition from Oklahoma, petitioner was arraigned in San Diego and Patrick O'Connor was appointed to represent him. At the time of the arraignment, O'Connor was already representing petitioner on a

pending robbery charge. On Wednesday, June 27, 1979, during the preliminary hearing before Judge Stahl, petitioner requested that O'Connor be relieved, stating, "I feel I'm being wrongly advised and there are several other personal things involved . . . . [H]e is doing an inadequate job as far as defending me at the best than he has (sic)." 2 P.H.T. 216-17. Judge Stahl denied petitioner's motion, observing that O'Connor "knows best how to conduct this matter, Mr. Hamilton, and from all I have seen, he is the best qualified by far of any attorney to represent you at this hearing." Id. at 217.

75. On Friday, September 14, 1979, during pre-trial motions before Judge Maas, petitioner requested again that O'Connor be removed from the case. 5 R.T. 1. The prosecutor, noting that "[w]e have heard this business from Mr. Hamilton

before," objected to hearing the motion without any prior notice and without an opportunity to brief the issue. Id. at 2-3. In considering whether to hear petitioner's request, the court recognized the potential for delay and, more importantly, the ability of a defendant to create delay through such motions: "Because as an obstructionist tactic, a defendant can raise this all the time, with no notice, and witnesses come here and expect to present their evidence, and go on." Id. at 3. Nevertheless, over the prosecutor's objection, Judge Maas continued the pre-trial motions so that the motion to relieve counsel could be heard by the presiding judge, Judge Gilliam. Id. at 4. In so ruling, Judge Maas stated, "I consider this an obstructionist tactic by Mr. Hamilton, but he has a right to have this issue raised,

and litigated, and disposed of." Id. at 5.

76. On Wednesday, September 19, 1979, before Judge Gilliam, petitioner's request was heard and considered. In requesting specific grounds for petitioner's motion, the court noted that O'Connor is "one of the better lawyers," and "has done everything timely, and he's interested in the case . . . ." VII R.T. 10. In objecting to the motion, the prosecutor stated, "it is clear that one of the effects of the defendant's motion will be to get another continuance of the trial date." Id. at 19.

77. During the hearing on September 19, petitioner claimed that he had lost trust in O'Connor as a result of O'Connor's failure to do everything demanded by petitioner during the preliminary hearing and the continuing defense investigation. Id. at 23-28.

Moreover, petitioner bemoaned O'Connor's inability or unwillingness to cure problems being experienced by petitioner due to his incarceration. Id. 28-30. After hearing the above complaints about O'Connor, Judge Gilliam indicated that he was inclined to deny the motion, as he was "confident that [O'Connor] will be as fair and as straight a shooter as you can get." Id. at 31.

78. However, after stating his complaints regarding O'Connor's performance, petitioner claimed that he was told by an employee of the Public Defender who "works under Mr. O'Connor" that petitioner may be advised to enter a plea of insanity. Id. at 32. Petitioner claimed that the employee was an investigator whom he had known since childhood, who also told him that he had better "watch" O'Connor. Id. at 32-33. Upon the court's request, petitioner

identified the employee as Doug Hendrix. Id.

79. Apparently accepting petitioner's story as true, and without further inquiry at this time, Judge Gilliam stated that a "breach of faith" had occurred. Id. at 34.[8/] Accordingly, O'Connor was relieved and the court ruled that his replacement would have to come from outside of the public Defender's Office. VII R.T. 34. Judge Gilliam explicitly stated that O'Connor was not being relieved because of anything he had done or failed to do in the case, notwithstanding petitioner's performance related complaints. Id. at 37.

---

8. When Judge Gilliam conducted a subsequent hearing to investigate the matter, considerable doubt was cast upon petitioner's allegations. Hendrix testified, "It's my opinion that Bernie fabricated everything he said in this courtroom today just so he can get a new lawyer. I tried my best to help him." 9 R.T. 47.

80. On Friday, September 21, 1979, Jerome Wallingford appeared before Judge Gilliam and stated that he had been contacted by the Public Defender in connection with taking over the defense of petitioner. 8 R.T. 42. Wallingford and petitioner had met "for a couple of hours" the day before, and petitioner stated to the court his willingness to have Wallingford represent him. Id. The court stated, "You have a good lawyer." Id. Wallingford was formally appointed later that day, again with petitioner's approval. 9 R.T. 43.

81. On Wednesday, November 7 and Friday, November 9, 1979, petitioner moved to have Wallingford removed and another attorney appointed. 11 R.T. 55, 59. After hearing extensively from petitioner in camera, Judge Gilliam stated, "I've been through all the reasons with you, and I can't see that you have

any reasonable grounds to remove Mr. Wallingford." 76 R.T. 29. At the conclusion of the hearing on November 9, 1980, Judge Gilliam nevertheless agreed to have another attorney appointed to assist Wallingford. Id. at 29. Petitioner apparently renewed his motion to have Wallingford relieved on Tuesday, November 20, and Wallingford did not object, stating, "I just don't think I can work with Mr. Hamilton, and I think he agrees at this point. . . . I feel like I have tried everything I can to try to work with him and at this point I just don't believe it would be fair to Mr. Hamilton to leave me on the case." Id. at 63.

82. On Monday, November 26, 1979, Ryan was formally appointed to represent petitioner, and Wallingford was relieved. 12 R.T. 4. Upon appointing Ryan, Judge Gilliam stated:

> Mr. Hamilton, I don't know that I'm going to talk to you any

> more about change of lawyers because we've been through two very, very competent lawyers and now three. Now you are working with Mr. Ryan, and he is also a competent lawyer. And the filibuster has got to stop. We're going to trial on this case.

Id. at 13. This court finds that Judge Gilliam's statement reflects the general belief of the trial court that petitioner was attempting to inject delay and uncertainty into the proceedings by constantly requesting that counsel be removed. This court finds said belief to be entirely correct inasmuch as petitioner's irrational and perpetual dissatisfaction with counsel can only be explained by his desire to manipulate the system.

83. Based upon the proceedings through November 26, 1979, when Ryan was appointed, this court finds that petitioner engaged in a pattern of activity that was not motivated by good

faith disputes over defense strategy, but rather was designed solely to manufacture potential error and cause delay. Most importantly, it is this context in which petitioner's subsequent motions to represent himself must be viewed.

84. On Monday, April 21, 1980, before Judge Gill, petitioner moved to have Ryan removed from the case. 17 R.T. 5. Petitioner charged Ryan and co-counsel Camberg with failing to raise certain issues which he deemed important, and stated that he could no longer trust them. Id at 6-13. Ryan responded that he believed that he could continue to represent petitioner to the best of his ability. Id. at 20. Louis Katz, Director of Defender Services for the county, reviewed in detail petitioner's history of dissatisfaction with his appointed attorneys, and concluded, "I know Mr. Ryan has done a very complete and competent job

in this area. I think, your Honor, it's just Mr. Hamilton is never going to be satisfied with whoever he gets." Id. at 22.

85. The prosecution opposed petitioner's request to have Ryan and Camberg removed, noting that the current trial date was already thirteen months removed from the date of the murder. Id. at 26. Notwithstanding the prosecution's desire to have the matter come to trial, petitioner stated, "And as far as time is concerned, I'm not worried about the time it takes." Id. at 28.

86. After hearing from all parties, Judge Gill found that Ryan and Camberg "have been working very diligently in Mr. Hamilton's behalf," and that Ryan "is well qualified by experience, competent training, background, to handle a case of this magnitude." Id. at 30.

Accordingly, Judge Gill denied the motion to relieve counsel. Id.

87. Upon Judge Gill's denial of the motion, petitioner stated, "I request to represent myself then. I might as well." Id. Judge Gill responded that the motion was not presently before the court, but could be raised at a later time. Id. at 30-31. The court then recessed for the day. Id. at 31. This is the first "request" relied upon by petitioner before this court, and is hereinafter referred to a "Request 1."

88. On Friday, April 25, 1980, before Judge Gill, petitioner renewed his motion to have Ryan relieved, and Ryan himself moved to be relieved, observing that since the hearing on April 21 petitioner had completely refused to speak to him. 18 R.T. 33. The court denied Ryan's motion for the same grounds upon which petitioner's motion was denied

on April 21. Id. at 34. After hearing extensively from petitioner, the court continued the hearing on petitioner's motion until April 28, 1980. Id. at 71.

89. On Monday, April 28, 1980, petitioner was again permitted by Judge Gill to discuss extensively his reasons for wanting Ryan and Camberg removed. Id. at 74-96. Primarily, petitioner bemoaned the fact that Ryan would not investigate petitioner's belief that Harry Piper, who discovered the victim's body, was the true killer. Id. at 74-75, 84. Petitioner attributed the failure of Ryan and Camberg to pursue the Piper theory to racial prejudice on their part. Id. at 96.

90. After explaining his reasons for wanting Ryan and Camberg removed, petitioner stated, "And if they're not going to defend me, I'd be better off making a fool of myself on my

own in front of -- ", at which point petitioner was interrupted by the court. Id. Petitioner did not pursue this expression of opinion further. This is the second "request" relied upon by petitioner before this court, and is hereinafter referred to as "Request 2."

91. After hearing from Ryan, and then hearing further from petitioner, Judge Gill denied petitioner's motion to relieve Ryan and Camberg. Id. at 111. The court stated that petitioner had presented no substantial basis supporting the motion to relieve Ryan and Camberg. Id. Petitioner immediately proceeded to ask Judge Gill about his pending request for telephone call privileges, and did not in any manner reiterate or otherwise allude to a desire to represent himself. Id. at 112.

92. On Friday, May 9, 1980, petitioner filed a handwritten

motion to relieve counsel and to represent himself. Id. at 114. However, before that motion could be heard, petitioner withdrew it and indicated that he instead wished to be designated co-counsel with Ryan and Camberg. Id. at 114. On Tuesday, May 13, 1980, Judge Gill granted petitioner's motion to be designated as co-counsel on the case with Ryan and Camberg. Id. at 135. The record suggests that this motion was granted in order to appease petitioner with respect to his role in the defense. Id. at 123-24.

93. On Tuesday, May 20, 1980, during pre-trial motions pursuant to Penal Code §§ 995 and 1538.5, Ryan advised Judge Maas that petitioner wished to renew his motion to represent himself. 19 R.T. 428. Ryan stated that "[petitioner] has told me that if, unless we proceed his way, he wants to be his own -- he wants me relived, he wants to represent himself."

Id. at 434. Petitioner stated his request in the alternative: "My request is to have Miss Camberg and Mr. Ryan relieved as counsel. In the event that is not granted, I would seek to renew my motion to proceed in pro per." Id. at 435. This is the third request relied upon by petitioner before this court, and is hereinafter referred to as "Request 3."

94. The prosecution again raised the prospect of delay, noting that every time the parties attempted to resolve pre-trial matters, "Mr. Hamilton has raised these issues with respect to representation . . . ." Id. at 439. The prosecutor stated, "But we can't stop the court processes every time Mr. Hamilton raises this issue of representation, because we will never get this damn thing done." Id. at 440.

95. After hearing from all parties on May 20, 1980, Judge Maas denied the alternative motion, finding:

> Mr. Hamilton has not stated a valid reason why Mr. Ryan should not represent him, and specifically the Court finds that for all intents and purposes Mr. Hamilton does not have a legitimate objection, but is only grasping at anything he can think of to delay the proceedings and I so find as to the 995 motion, and I will not relieve Mr. Ryan nor will I allow you to represent yourself in the matter. I find that you are not competent to represent yourself in the 995 because I do not believe that you understand the legal principles involved, the issues involved, or are able to fairly and adequately represent yourself.

Id. at 450 (emphasis supplied).

96. On June 11, 1980, Ryan moved to continue the trial, which was then set for June 23, 1980, so that the parties could await the result of a case then pending before the California Supreme Court, People v. Hovey, as that decision was considered relevant to the

proceedings. 20 R.T. 1. The court granted the motion, and set a new trial date of August 12, 1980. Id. at 5. On July 30, 1980, the parties stipulated to a continuance of the trial from August 12, 1980 to September 10, 1980. 21 R.T. 138. The California Supreme Court issued its decision on August 28, 1980. Hovey v. Superior Court, 28 Cal.3d 1 (1980), cert. denied, 488 U.S. 871 (1988).[9/]

97. Subsequent to the court's denial on May 20, 1980, and prior

---

9. The California Supreme Court's decision in Hovey required "that in future capital cases that portion of the voir dire of each prospective juror which deals with issues which involve death-qualifying the jury should be done individually and in sequestration." Hovey, 28 Cal.3d at 80. In so ruling, the court expressed its concern that the court's dismissal of those venirepersons who express unequivocal opposition to the death penalty "is likely to be interpreted by the remaining jurors as an indication that the judge in particular and the law in general disapprove of such attitudes." Id. at 74. Insofar as Hovey sought to eliminate this process, the decision benefitted petitioner.

to empanelment of the jury, petitioner submitted additional motions seeking to represent himself that he later withdrew, see 21 R.T. 150; 22 R.T. 4; 29 R.T. 410; 34 R.T. 1090, and one motion to represent himself that was heard in camera on the first morning of trial, after the jury had been empaneled, which was denied, 40 R.T. 2008-14. In addition, during trial petitioner filed a petition for writ of habeas corpus attacking the denial of his request to represent himself, and requested a continuance. 47 R.T. 2694. This petition was denied for a number of reasons, including the court's concern with further delay and petitioner's inability to mount a defense on his own. Id. at 2712-14. These motions further reflect the persistence with which petitioner sought to delay the trial.

98. During the evidentiary hearing, Judge Orfield testified that

petitioner never made an unequivocal request for self-representation. III E.H. 9. In reaching this conclusion, Judge Orfield cited the "ambivalence" on petitioner's part in making the requests. III E.H. 9-10.

99. Petitioner's own expert witness, Howard Gillingham, after reviewing letters written by petitioner to Robinson and Ryan, testified before this court that petitioner "goes back and forth, quite frankly, on the pro per action and seems to use that as part of his frustration -- venting his frustration to get control of his case in some way, of his own destiny." IV E.H. 26.

100. Ryan testified before this court that he does not believe that petitioner "was ever sincere in wanting to represent himself." VI E.H. 38. In support of this conclusion, Ryan stated, "I believe he knew how to do it but was

trying to make a record that would appear that he was trying to go pro per but he would not go that last step that was needed to do so." Id. at 38. In fact, Ryan advised petitioner how to move to proceed in propria persona, and provided him with the relevant legal authority, although petitioner never relied on it. Id. at 36-37.

101. Robinson testified before this court that each time petitioner filed a motion to relieve counsel, Ryan "would come down to the jail and he would say, `Bernard, do you really want me off this case? If you really want me off this case, I will leave.' And Bernard would say `No.'" VIII E.H. 134. In addition, petitioner reiterated to Robinson privately his desire to have Ryan stay on the case, despite the pendency of the motions to relieve. Id. Robinson noted that petitioner "was bent on

stopping the trial." Id. at 149. According to Robinson, "he was just very afraid of proceeding to trial and that was his way of acting out. He definitely had informed me that he did not want to have Mr. Ryan relieved." IX E.H. 142.

102. Based on the testimony received at the evidentiary hearing and the state court transcripts, this court finds the testimony offered by Judge Orfield, Ryan, and Robinson credible and entirely consistent with the events documented in the state court transcripts. Specifically, petitioner's persistent attempts to relieve capable counsel suggest a desire to delay the trial, and this inference is supported and confirmed by the above referenced testimony.

B. Conclusions of Law

27. A criminal defendant in a state court trial has an absolute right to be represented by counsel or to

represent himself. Faretta v. California, 422 U.S. 806, 807 (1975). The assertion of the right to self-representation must be knowing and intelligent, id. at 835, timely and not for the purpose of delay, United States v. Smith, 780 F.2d 810, 811 (9th Cir. 1986) (per curiam), and unequivocal, Armant v. Marquez, 772 F.2d 552, 555 (9th Cir. 1985), cert. denied, 475 U.S. 1099 (1986).

28. Before a defendant's decision to waive counsel will be knowing and intelligent, he "must be aware of the nature of the charges against him, the possible penalties, and the dangers and disadvantages of self-representation . . . ." United States v. Balough, 820 F.2d 1485, 1487 (9th Cir. 1987).

29. A Faretta request is timely if it is asserted "before the jury is empaneled, unless it is made for the

purpose of delay." Smith, 780 F.2d at 811 (citations omitted).

30. The requirement that the request be unequivocal serves two purposes. Adams v. Carroll, 875 F.2d 1441, 1444 (9th Cir. 1989). "First, it acts as a backstop for the defendant's right to counsel, by ensuring that the defendant does not inadvertently waive that right through occasional musings on the benefits of self representation." Id.; see also Brewer v. Williams, 430 U.S. 387, 404 (1977) (courts must indulge in every reasonable presumption against waiver of the right to counsel).

31. Second, the requirement that the request be unequivocal serves an institutional purpose by preventing the manipulative defendant from creating error as a result "of the mutual exclusivity of the rights to counsel and self-representation."

Adams, 875 F.2d at 1444. In other words, where a defendant vacillates, the trial court might be placed in a difficult position: "If the court appoints counsel, the defendant could, on appeal, rely on his intermittent requests for self-representation in arguing that he had been denied the right to represent himself; if the court permits self-representation, the defendant could claim he had been denied the right to counsel." Id. As the court stated in Carroll, "the requirement of unequivocality resolves this dilemma by forcing the defendant to make an explicit choice. If he equivocates, he is presumed to have requested the assistance of counsel." Id.

32. However, a Faretta request is not considered equivocal merely because it is conditional on the court's denial of a motion to substitute counsel,

provided that there is no evidence of vacillation. Id. at 1445.

33. Petitioner would have this court view his purported Faretta requests in a vacuum, without reference to his continuous motions to relieve competent counsel and the corresponding inference that petitioner was only interested in delaying the trial. In other words, petitioner argues only from the specific statements made on April 21 (Request 1), April 28 (Request 2), and May 20 (Request 3), and concludes that those statements, standing alone, constitute unequivocal requests to represent himself. However, it is clear that any inquiry into delay and equivocality requires that the requests be viewed in the larger context of petitioner's ongoing attempts to relieve counsel and the motivations which may reasonably be ascribed to those

attempts, based on the totality of the circumstances and the supporting evidence.

34. The court is satisfied that petitioner's purported requests were knowing and intelligent insofar as he recognized the nature of the charges against him, the potential penalties, and the dangers inherent in representing himself.

35. The court is likewise satisfied that each purported request was timely insofar as it was asserted prior to empanelment of the jury.

36. However, the court concludes that each request made by petitioner was made for the purpose of delay. Based upon petitioner's perpetual dissatisfaction with counsel, the lack of any reasonable explanation for that dissatisfaction, and the evidence received by the court through the state court transcripts and the evidentiary hearing,

the court concludes that petitioner's request to proceed pro se were made for the sole purpose of delaying the trial date.

37. It is important to note that the court does not reach this conclusion as a result only of petitioner's perpetual dissatisfaction. This fact, standing alone, might not support the conclusion being drawn here. Instead, the court renders its decision because of the circumstances surrounding petitioner's repeated requests for new counsel and/or to represent himself, as well as the evidence received at the evidentiary hearing. When the issue is placed in the proper context and all of the available evidence is considered, the court is left with the inescapable conclusion that petitioner was using every tactic available to him to create delay.

38. Petitioner argues that his requests could not have been made for the purpose of delay because the parties had stipulated to a continuance of the trial date in order to await the Hovey decision. See Petitioner's Brief, p. 90. This contention is wholly without merit. The motion to continue the trial in order to await the Hovey decision was not made until June 11, 1980, and the stipulation continuing the trial date for that reason was not accepted by the court until July 30, 1980. See supra Finding of Fact 96. However, the purported Faretta requests were made on April 21, April 28, and May 20, 1980, when the trial date was set for June 23, 1980. Therefore, the subsequent continuance has no bearing whatsoever on whether petitioner was seeking to delay the trial by virtue of his requests.

39. Because the court concludes that each of the three disputed

Faretta motions were made for the purpose of delay, the motions were properly denied.

40. Alternatively, the court concludes that each request was made equivocally. Request 1 and Request 2 were both statements in which petitioner did not manifest a true desire to represent himself, but merely frustration with the process and the denial of his request to substitute counsel. See supra Finding of Fact 87 ("I might as well."); Finding of Fact 90 ("I'd be better off making a fool of myself on my own . . . ."). Because Request 1 and Request 2 were accompanied by these self-defeatist pronouncements, they cannot be considered unequivocal. Rather, each request was plainly "a momentary caprice or the result of thinking out loud." Carroll, 875 F.2d at 1445. Because the court must indulge in every reasonable presumption against

waiver of the right to counsel, Request 1 and Request 2 must be considered equivocal.

41. With respect to Request 3, the court recognizes that it was stated more firmly. See supra Finding of Fact 93. However, upon consideration of the surrounding circumstances and the evidence adduced at the evidentiary hearing, this court concludes that Request 3 also was not made unequivocally. In order to reach this conclusion, the court has looked beyond the mere words spoken, as those words provide only the most superficial aid in determining whether petitioner's request was unequivocal. In this case, the inquiry into unequivocality must encompass more than mere semantics.

42. Most importantly, there is overwhelming evidence indicating that petitioner's prime motivation was to delay the trial, and that he did not

really want to relieve Ryan. See supra Findings of Fact 98-102. When this evidence is applied to petitioner's conduct throughout the state proceedings, an unmistakable pattern of manipulation and dishonesty emerges. Against this backdrop, any request made by petitioner must be carefully evaluated in order to discern his true motivations. In this instance, the court concludes that the only thing unequivocal about Request 3 was petitioner's unequivocal desire to delay the trial, as recognized by Judge Maas at the time. The request itself, while unequivocal to the naked ear, cannot be considered unequivocal when considered in the context of petitioner's ongoing attempts to frustrate the administration of justice.

43. Because the court alternatively concludes that each of the three disputed Faretta motions were made

equivocally, said motions were properly denied.

VI. ALLEGED IMPROPER ADMISSION OF EVIDENCE

A. Findings of Fact

103. The trial court admitted into evidence three letters written by petitioner while he was in prison for burglary in 1973, each of which evidenced petitioner's extraordinary fear of prison and willingness to do anything to secure his release. See 52 R.T. 3228-29 (petitioner claims he was an informant; "I'm afraid to come out of my cell and I'm afraid to hear from home"); 52 R.T. 3230 ("I had been threatened quite a few times and I'm under great fear"); 52 R.T. 3232-3236 (petitioner offers to turn in his own brother and many others in exchange for leniency). Judge Orfield rules that the letters were relevant to motive, pursuant to the government's theory that petitioner

would do anything to avoid returning to prison, including killing a witness. 24 R.T. 324. Those portions of the letters which the judge found inappropriate were excised. See 52 R.T. 3208.

104. The trial court allowed Deputy Sheriff Parsons to testify to a conversation between Parsons and petitioner, which Parsons claimed occurred when he was securing petitioner's chains in prison. Parsons testified that petitioner stated, "All right, you have your fun, I'll have mine later." Parsons responded, "I thought you already had your fun," to which petitioner replied, "Yeah, and I'll kill a lot more, too, and you may be first on my list." 53 R.T. 3329. Judge Orfield ruled the testimony admissible as a spontaneous statement that was not the result of custodial interrogation. Id. at 3325.

105. By stipulation of counsel, the jury was informed that petitioner had purchased a saw, butcher knife, and two shanks of twine, while travelling in the victim's van, and after threatening to kill former girlfriend Donna Hatch. The trial court had ruled the evidence admissible, finding that the evidence indicated that petitioner might have intended to kill Hatch in the same manner as the victim in this case was killed, and for the same reason. 25 R.T. 387. Therefore, the court concluded that the purchases "might well show a consciousness on the part of the defendant of his guilt." Id.

106. The trial court admitted into evidence a letter written by petitioner to a friend, Theresa Roch, in which petitioner relates threats from a person named Quack to kill O'Connor, the prosecutors, the prosecution's

criminalist, "and at least one member of their family," if petitioner is convicted. 47 R.T. 2741. Petitioner notes in the letter that Quack seeks his approval for these murders, but he has not decided yet whether to give such approval. Id. Because petitioner knew that his outgoing mail was being read by the authorities, Judge Orfield ruled the letter admissible as an attempt to intimidate the prosecutors and the criminalist, who was a key witness. Id at 2738.

B. Conclusions of Law

44. In the federal habeas corpus context, a petitioner's attack on the correctness of state evidentiary rulings does not allege a cognizable deprivation of federal rights. Gutierrez v. Griggs, 695 F.2d 1195, 1197 (9th Cir. 1983). However, when a petitioner claims that the improper admission of evidence deprived him of due process under the

fourteenth amendment, he alleges a cognizable claim under § 2254. Kealohapauole v. Shimoda, 800 F.2d 1463, 1465 (9th Cir. 1986), cert. denied, 479 U.S. 1068 (1987). In order to prove a due process violation, petitioner must demonstrate that "the admission of the evidence so fatally infected the proceedings as to render them fundamentally unfair." Jammal v. Van De Kamp, 926 F.2d 918, 919 (9th Cir. 1991). Under this standard "the presence or absence of state law violation is largely beside the point." Id. at 919-20. However, "adherence to state evidentiary rules suggests that the trial was conducted in a procedurally fair manner . . . ." Id. at 919.

45. In this case, petitioner has fallen far short of the heavy burden he bears under the relevant authority. First of all, this court

concludes that the admission of the disputed evidence by Judge Orfield was not an abuse of discretion under the evidentiary laws of California. Each piece of evidence disputed by petitioner was relevant, and in each case the probative value was not outweighed by the danger of undue prejudice. See Cal. Evid. Code § 352.[10/] Therefore, pursuant to Jammal there is at lest the suggestion of procedural fairness.

---

10. The court recognizes that the California Supreme Court, on direct appeal, held that the admission of the three letters from 1973 was non-prejudicial error, but that the other items were admitted properly. See Hamilton I, 41 Cal.3d at 424-30. While the California Supreme Court held that the theory of motive with respect to the 1973 letters "simply does not wash," Hamilton I, 41 Cal.3d at 426, this court disagrees. Petitioner's aversion to incarceration went well beyond that experienced by most defendants and former convicts, and he threatened to kill Donna Hatch when it appeared her perceived intransigence might also damage his ability to stay out of jail. Under these circumstances, it is hardly speculative to theorize as to the desire of a burglar to kill an eyewitness.

46. Even if one or more of the pieces of evidence were admitted improperly, petitioner has not demonstrated fundamental unfairness. While the evidence may have damaged petitioner's defense, it is not the type of evidence that "necessarily prevents a fair trial." Kealohapauole, 800 F.2d at 1465; see also Jammal, 920 F.2d at 921. As this court has already found, the evidence arrayed against petitioner was overwhelming, see Finding of Fact 73, and the evidentiary items disputed here were peripheral to the primary thrust of the prosecution's case. Therefore, even if one or more of the items was admitted improperly, this court concludes that petitioner's trial was not offensive to the fourteenth amendment.

VII. ALLEGED VIOLATION OF PETITIONER'S RIGHT BY THE CALIFORNIA SUPREME COURT

A. Findings of Fact

107. On direct appeal, the California Supreme Court initially affirmed petitioner's conviction, but reversed the findings of special circumstances and the judgment of death. Hamilton I, supra note 1. The court held that the trial judge's failure to instruct that intent to kill was an element of the felony-murder special circumstances, in accordance with Carlos v. Superior Court, 35 Cal.3d 131 (1983), and mandated reversal of the death penalty judgment. Hamilton I, 41 Cal.3d at 431-32.

108. The Supreme Court granted the Attorney General's petition for a writ of certiorari, ordered the judgment of the California Supreme Court vacated, and remanded the case for reconsideration in light of its decision

in Rose v. Clark, 478 U.S. 570 (1986). California v. Hamilton, 478 U.S. 1017 (1986). In Rose, the Court held that the doctrine of harmless error may apply to jury instructions which erroneously shift the burden of proof to the defendant, provided that the record developed at trial establishes guilt beyond a reasonable doubt. Rose, 478 U.S. at 579-82.

109. Prior to remand by the United States Supreme Court, the California Supreme Court decided People v. Anderson, 43 Cal.3d 1104 (1987), in which the court overruled Carlos and held that intent to kill is not an element of the felony-murder special circumstance, except when the defendant is an aider and abettor rather that the actual killer.

110. Upon revisiting the instant matter on remand, the California Supreme Court stated that the entire cause

was before the court "because the United States Supreme Court vacated the judgment in Hamilton I and rendered the decision a nullity." Hamilton II, 45 Cal.3d at 363. Moreover, the court reasoned that "the doctrine of law of the case does not bar reconsideration of any point decided in Hamilton I. The doctrine may be applied only when and to the extent the prior decision was binding force. Because the judgment in Hamilton I was vacated, that decision, of course, is a nullity and as such has no binding force." Id. (citation omitted).

111. With the scope of review thus defined, the California Supreme Court reexamined Hamilton I in its entirety, and affirmed the judgment of death pursuant to Anderson. In applying Anderson, the California Supreme Court recognized that "there was no evidence that [petitioner] was an aider and

abettor." Hamilton II, 45 Cal.3d at 364. Therefore, "the court did not err by failing to instruct on intent." Id. Because the California Supreme Court concluded that the trial judge was not required to instruct on intent, it declined to reach the issue of whether the failure to so instruct constituted harmless error under Rose. Id.

B. Conclusions of Law

.47. This court concludes that petitioner suffered no constitutional deprivation as a result of the California Supreme Court's application of Anderson in Hamilton II. After the United States Supreme Court vacated Hamilton I, the California Supreme Court was procedurally free to reexamine all aspects of its initial decision, including its erroneous conclusion that the trial court was required to instruct on intent to kill. Petitioner's death sentence has been

rendered neither arbitrary nor unreliable by the California Supreme Court's decision in Hamilton II.

48. Nor does the doctrine of law of the case preclude the California Supreme Court's reexamination if its earlier ruling. Indeed, the doctrine recognizes an exception where there has been an intervening change in the law. See George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd., 49 Cal.3d 1279, 1291 (1989).

49. Moreover, the California Supreme Court's retroactive application of Anderson does not constitute a violation of the constitutional prohibition against ex post facto laws. The California Supreme Court has explicitly held that there is no violation of federal due process where Anderson is applied to felony murders occurring before Carlos, as in this case.

People v. Poggi, 45 Cal.3d 306, 327 (1988), cert. denied, 492 U.S. 925 (1989). Most importantly, "Carlos itself concluded that the statute was ambiguous with respect to the requirement of intent to kill for a felony-murder special circumstance." Id. Therefore, "[t]here was ample basis for pre-Carlos foreseeability of a holding that such intent is not required for the actual killer." Id. With respect to petitioner's assertion of federal rights, this court agrees with the Poggi analysis. Cf. In re Baert, 205 Cal.App.3d 514 (1988) (ex post facto principles require Carlos instruction where crime occurred during four year window between Carlos and Anderson), cert. denied, 109 S.Ct. 3242 (1989).

50. In addition, the California Supreme Court's decision in Hamilton II does not constitute an equal

protection violation. When the state prosecutes criminal defendants, the results for those similarly situated will not always be consistent, for a variety of procedural and substantive reasons. However, in alleging an equal protection violation, petitioner must do more than challenge the timing of the decisions rendered through the appellate process. The mere fact that said timing created an unfortunate result from his perspective will not support the conclusion that the criminal laws are being disparately enforced to his constitutional detriment.

51. Nor does the California Supreme Court's failure to notify the parties of its intent to apply Anderson constitute a violation of procedural due process. There is no federal constitutional right which requires that petitioner be allowed to brief every single issue presented to the

appellate court. With respect to petitioner's alleged state entitlement under Cal. Govt. Code § 68081, any error under that section does not give rise to a federal claim for relief under § 2254. At any rate, the alleged failure to comply with Cal. Govt. Code § 68081 was harmless as the application of Anderson to this case was unavoidable and straightforward.

52. Finally, even if the California Supreme Court erred by going beyond the scope of the remand order and/or by applying Anderson retroactively, this court holds as a matter of law that such error was harmless as Rose clearly mandated reversal of Hamilton I. The failure of the trial court to instruct on intent to kill in this case was harmless under Rose as the evidence conclusively demonstrated that the victim was killed intentionally. See Hamilton I, 41 Cal.3d 408, 438 ("[T]he condition of Mrs.

Buchanan's body amply established an intent to kill in the absence of any evidence in the record supporting the majority's accidental death theory . . . . It is simply inconceivable that, if the killing were indeed 'accidental,' defendant would have neglected to attempt to prove that fact.") (Lucas, J., dissenting). Therefore, the reversal of Hamilton I was inevitable even if the California Supreme Court had not acted in the manner now challenged by petitioner.

VIII. ALLEGED IMPROPER JURY INSTRUCTIONS

A. Mandatory Sentencing Instruction

(a) Findings of Fact

112. At the close of the penalty phase, the jury was instructed pursuant to former CALJIC No. 8.84.2, which incorporated the mandatory sentencing language of Cal. Penal Code 190.3:

> After having heard all of the evidence, and after having heard

> and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without possibility of parole.

70 R.T. 4669.

113. At petitioner's request, the court also instructed the jury, "In weighing the aggravating and mitigating factors you are not to merely count numbers on either side. You are instructed rather to weigh and consider the factors on each side as a whole." Id. at 4664 (emphasis supplied).

114. During his penalty phase argument, the prosecutor stated, "The issue of determining the punishment

for these horrendous crimes rests in your discretion, guided by some factors, but not limited to those factors . . . . [I]t is going to be your decision. You are the members of the community and you are the conscience of the community, and you will be called upon to make this tremendous decision, tough decision . . . ." Id. at 4620. Near the end of his argument, the prosecutor observed, "So, ladies and gentlemen, you are the ones who have to add up and come to the total how does the alleged mitigation stack up against the overwhelming aggravation." Id. at 4641.

115. During his penalty phase argument, Ryan stated, "[I]t is for the jury to determine the appropriate punishment. If you find that one single factor in mitigation is sufficient to return a verdict of life without the possibility of parole, that is your choice." Id. at 4650. Near the end of

his argument, Ryan informed the jury, "You ladies and gentlemen are never going to be asked to make such a decision again. You are going to be asked whether or not this man lives or dies,and it is your decision." Id. at 4660.

(b) Conclusions of Law

53. Notwithstanding the California Supreme Court's recognition that former CALJIC 8.84.2 "leave[s] room for some confusion as to the jury's role," People v. Brown, 40 Cal.3d 512, 544, n.17 (1986), rev'd on other grounds, 479 U.S. 538 (1987), the United States Supreme Court has explicitly upheld the constitutionality of the instruction. Boyde v. California, 110 S.Ct. 1190 (1990).

54. In Boyde, petitioner claimed that the instruction violated the eighth amendment because it prevented the jury from making an individualized

assessment of the appropriateness of the death penalty. Id. at 1196. The Court rejected this argument, finding that "the mandatory language of CALJIC 8.84.2 is not alleged to have interfered with the consideration of mitigating evidence." Id. The Court concluded that "[p]etitioner's claim that the 'shall impose' language of CALJIC 8.84.2 unconstitutionally prevents 'individualized assessment' by the jury is thus without merit." Id.

55. In this case, petitioner's attempt to distinguish Boyde is wholly unpersuasive. While in Boyde there was no allegation that the mandatory language interfered with consideration of the mitigating evidence, here there is simply no evidence suggesting such interference. This court concludes that the supplemental instruction given by the court, as well as the closing arguments of

the prosecutor and defense counsel, clearly indicate that the jury was able to perform an individualized assessment of the appropriateness of the death penalty and did not mechanically weigh the factors in reaching its decision.

56. Furthermore, the disputed instruction did not create an unconstitutional presumption that death was the appropriate penalty, as it allowed the jury to consider all factors in mitigation, and to reject the death penalty even if only one mitigating factor persuaded them that life imprisonment was the appropriate penalty. The prosecutor's closing argument, including his comment with respect to the victim, do not alter the conclusions of this court.

57. For these reasons, this court concludes that the use of the mandatory sentencing language under these

circumstances was not constitutionally impermissible.

B. The Factor (k) Instruction

(a) Findings of Fact

116. After Ryan presented his penalty phase case, which consisted almost entirely of evidence of petitioner's character and background, see R.T. 4587-4613, the court instructed the jury pursuant to CALJIC 8.84.1: "In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall take into account and be guided by the following factors, if applicable." 70 R.T. 4662. Among the factors to be considered was former factor (k): "Any other circumstance which extenuates the gravity of the crime even though it was not legal excuse for the crime." (Id. at 4664.

117. After instructing the jury on the factors to be considered, the court stated, "The mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death sentence on Mr. Hamilton. But you should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances presented as reasons for not imposing the death penalty." Id at 4664-65.

118. The prosecutor argued that "[t]here is (sic) absolutely no extenuating circumstances whatsoever, no extenuating circumstances in the way that he beat, robbed and kidnapped and killed that poor victim." Id at 4636. After restating the absence of any extenuating

circumstances, and while still arguing on this issue, the prosecutor observed, "He doesn't even have the broken home excuse. He had a good home life." Id. The prosecutor then attempted to rebut certain of the mitigating circumstances presented by the defense, all of which went to the victim's background. Id. at 4637-39.

(b) Conclusions of Law

58. Notwithstanding the California Supreme Court's conclusion that the language of factor (k) might mislead jurors about the scope of their discretion, People v. Easley, 34 Cal.3d 858 (1983), the United States Supreme Court upheld the constitutionality of factor (k) as used in this case. Boyde, 110 S.Ct. at 1201.

59. In Boyde, as here, petitioner claimed "that the 'catch-all' factor (k) did not allow the jury to consider and give effect to non-crime-

related mitigating evidence because its language . . . limits the jury to other evidence that was related to the crime." Boyde, 110 S.Ct. at 1197. In considering factor (k), the Court established the standard to be applied by this court: "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Id. at 1198.

60. In upholding the constitutionality of factor (k), the Court observed that "[p]etitioner had an opportunity through factor (k) to argue that his background and character 'extenuated' or 'excused' the seriousness of the crime, and we see no reason to believe that reasonable jurors would resist the view, 'long held by society,' that in an appropriate case such evidence would counsel imposition of a sentence

less than death." Id. at 1199. The Court squarely rejected petitioner's contention that the language of factor (k) limited the jury's consideration only to circumstances directly related to the crime. Id. at 1199.

61. Moreover, the Court noted that when factor (k) is considered in the context of the other factors, which do allow for consideration of mitigating evidence not associated with the crime itself, "it seems even more improbable that jurors would arrive at an interpretation that precludes consideration of all non-crime-related evidence." Id. The Court further reasoned that all of the defense evidence presented at the penalty phase related to petitioner's background and character, "and we think it unlikely that reasonable jurors would believe the court's instructions transformed all of this

'favorable testimony into a virtual charade.'" Id. (quoting California v. Brown, 479 U.S. 538, 542 (1987)).

62. Finally, the Court also considered petitioner's contention that "arguments by the prosecutor immediately before the jury's sentencing deliberations reinforced an impermissible interpretation of factor (k) and made it likely that jurors would arrive at such an understanding." Id. at 1200. With respect to this allegation, which is identical to that made by petitioner here, the Court noted that "arguments of counsel generally carry less weight with a jury than do instructions from the court." Id. In Boyde, as here, the prosecutor's "principal tack was not to contend that background and character were irrelevant, but to urge the jury that despite petitioner's past difficulties, he must accept responsibility for his actions."

Id. at 1200. The Court concluded that this type of argument did not unconstitutionally taint factor (k).

63. Again, petitioner's attempt to distinguish Boyde is singularly weak. In this case, the jury received substantial evidence concerning petitioner's background and character, which the prosecution strenuously and properly attempted to rebut. Moreover, the trial court in this case explicitly informed the jury that they were not limited in considering only those factors in mitigation which he had listed. In addition, as the Court has instructed, factor (k) must be viewed in the context of the other factors, which do allow for non-crime mitigating evidence. Therefore, it is clear that there is absolutely no likelihood that the jury applied factor (k) in a way that prevented the

consideration of petitioner's background and character evidence.

64. For these reasons, this court concludes that the use of factor (k) under these circumstances was not constitutionally impermissible.

C. Modified Briggs Instruction

(a) Findings of Fact

119. At the time of petitioner's trial, state law mandated that the trial court instruct the jury on the Governor's authority to commute a life sentence, even where such sentence was imposed without possibility of parole. See former Cal. Penal Code § 190.3; former CALJIC 8.84.2. The so-called Briggs instruction provided in relevant part:

> You are instructed that under the state constitution, a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to

> a lesser sentence that would include the possibility of parole.

After Ryan objected to the instruction, the parties reached an agreement on a modified Briggs instruction, which began with the language quoted above, but contained the following substantial explanatory provisions:

> This is subject to the requirement that, in the case of any person twice convicted of a felony, a commutation or modification may not be granted absent the written recommendation of at least four justices of the California Supreme Court. Further, a life sentence requires a minimum incarceration of 25 years less one-third off for good time credits before parole may be considered by the proper authorities. You are now instructed, however, that the matter of a possible commutation or modification of sentence is not to be considered by you in determining the punishment for Mr. Hamilton. You must not speculate as to whether such commutation or modification would ever occur. It is not your function to decided now whether this man will be suitable for parole at some future date. So far as you are

> concerned, you are to decide only whether this man shall suffer the death penalty or whether he shall be permitted to remain alive. If upon consideration of the evidence you believe that life imprisonment without possibility of parole is the proper sentence, you must assume that the Governor, the Supreme Court, and those officials charged with the operation of our parole system will perform their duty in a correct and responsible manner, and that Mr. Hamilton will not be paroled unless he can be safely released into society. It would be a violation of your duty as jurors if you were to fix the penalty at death because of a doubt that the Governor and other officials will properly carry out their responsibilities.

70 R.T. 4667-69.

120. During the penalty phase argument, the prosecutor stated, "This defendant wouldn't spend all his time in prison thinking about his horrible crimes. He'd be conniving and devising ways to manipulate the system and get out." Id. at 4645-46. Petitioner claims that this statement, because it implied he

might be able to get out of prison, eviscerated the court's attempts to instruct the jury that they were not to consider petitioner's potential for parole.

(b) Conclusions of Law

65. In California v. Ramos, 463 U.S. 992 (1983), the Court upheld the constitutionality of the unmodified Briggs instruction. The Court held that the instruction "gives the jury accurate information of which both the defendant and his counsel are aware, and it does not preclude the defendant from offering any evidence or argument regarding the Governor's power to commute a life sentence." Id. at 1004. Moreover, the Court rejected the defendant's contention that the Briggs Instruction is constitutionally infirm because it deflects the jury's focus from its central task." Id. at 1005. "In sum, the Briggs

Instruction does not violate any of the substantive limitations this Court's precedents have imposed on the capital sentencing process." Id. at 1013.[11]

66. The modified Briggs Instruction given in this case is not constitutionally infirm, even when considered in connection with the prosecutor's remark anticipating petitioner's future attempts to get out of prison. Most importantly, the modifications agreed to by the parties improved the unmodified Briggs Instruction from the defense perspective. In this regard, it should be noted that the impetus behind the modification came from petitioner's trial counsel, who was

---

11. On remand, the California Supreme Court found the Briggs Instruction incompatible with the state constitution. People v. Ramos, 37 Cal.3d 136, 153 (1984). This result, of course, does not affect this court's inquiry of a federal habeas petition.

seeking to mitigate the impact of the unmodified Briggs Instruction.

67. The modifications accepted by the court operated to petitioner's benefit in two ways. First, the information concerning the actual logistics of commutation suggest that the possibility of parole for petitioner in this case is remote. This counteracts the potentiality that a jury may impose death simply because of its fear that a life sentence will be substantially shortened by the authorities. Second, the admonition not to consider the possibility of modification or commutation is significant, and there is nothing in the record which would lead this court to speculate that the jury either did not hear or did not listen to the trial judge's admonition. See Boyde, 110 S.Ct. at 1200 (impact of jury instructions not lessened by contrary arguments by counsel;

instructions are "viewed as definitive and binding statements of the law").

68. The prosecutor's remark described above, see Finding of Fact 120, does not change this result, nor does it suggest that the jury was encouraged to speculate as to whether petitioner was likely to be paroled. Taken in context, it is clear that the prosecutor's contention was not directed, either implicitly or explicitly, towards the commutation power of the governor. Rather, this court concludes that the comment, which refers primarily to petitioner's lack of remorse, reflects the prosecutor's proper desire to convey to the jury petitioner's manipulative personality and inability to think of anybody but himself. Therefore, the comment did not taint the modified Briggs Instruction.

69. For the reasons stated above, this court concludes that the reading of the modified Briggs Instruction was not constitutionally infirm.

IX. ADJOURNMENT OF THE JURY DURING DELIBERATIONS

A. Findings of Fact

121. On December 18, 1980, after the jury had deliberated for approximately 2.5 days, the court consulted with the jury and ordered an adjournment of deliberations until January 5, 1981. 65 R.T. 1. The court ordered the adjournment because of the pendency of the holidays and at least one juror's inability to deliberate in the week immediately preceding Christmas. Id.

122. Petitioner claims that he never assented to the adjournment, and petitioner has testified before this court that he protested to trial counsel,

who did not enter a formal objection. IV E.H. 161-62.

123. Petitioner has not introduced juror affidavits or other evidence suggesting that any of the jurors acted improperly during the break by discussing the case with others or by failing to avoid media coverage of the case.

B. Conclusions of Law

70. The trial court did not abuse its discretion in ordering the adjournment. It is well within the province of the court to allow a deliberating jury to break for the holidays; to hold otherwise would virtually ensure the unavailability of jurors to serve on long trials.

71. Even if the adjournment violated some discrete aspect of state law, see e.g., People v. Santamaria, 229 Cal.App.3d 269 (1991) (no

good cause for eleven day adjournment after one day of deliberations, where only reason for adjournment is trial judge's unspecified plans), this court concludes that such violation did not render the trial fundamentally unfair. Accordingly, petitioner was not deprived of his constitutional right to due process.

X. PETITIONER'S CLAIMS FILED IN PROPRIA PERSONA

A. Findings of Fact

124. As noted above, although petitioner's counsel filed an amended petition on his behalf, petitioner was permitted to file amendments in propria persona to the petition in consolidated case 90-0291-B. See supra note 4 and accompanying text. Although petitioner has been represented by highly competent counsel in these proceedings, his perpetual dissatisfaction with his appointed attorneys convinced this court

that the pro per petition and its amendments should not be considered precluded by or subsumed under the amended petition filed by counsel.[12/] By this method, the court sought to ensure that petitioner's interests were protected by counsel, while at the same time allowing

---

12. While petitioner's dissatisfaction with counsel in this proceeding has been perpetual, it has never been meritorious. The court has denied petitioner's motions to relieve one or both habeas counsel on three occasions. See Nunc Pro Tunc Order, December 17, 1990 (finding "no evidence suggesting that Mr. Benzian has provided ineffective assistance of counsel . . . ."); Order, January 23, 1991 ("The court views petitioner's request to relieve both counsel as a dilatory tactic, and the court notes that in its view both counsel are working diligently and effectively on behalf of petitioner."); Order, August 19, 1991 (The court's conclusions with respect to counsel's performance have only been reinforced by effective representation during evidentiary hearing and in post-hearing brief). Notwithstanding these orders, the unique posture of this case led the court to conclude that petitioner should not be silenced merely because his counsel were diligently pursuing those claims which they believed were legally and factually sound.

petitioner to assert all claims which he believed appropriate, even if counsel, for strategic reasons or otherwise, did not.

125. Respondents were ordered to respond to the pro per amendments, and petitioner was allowed to file his own traverse to that response. See Nunc Pro Tunc Order, December 17, 1990, para. 1; Order, January 23, 1991, para. 3.

126. The court's objective has never changed: a full and fair adjudication of all appropriate claims in one timely proceeding. Notwithstanding respondents' protests to petitioner's pro per role, see Answer on the Merits to Pro Per Petition for Writ of Habeas Corpus by Prisoner Represented by Counsel, p. 7, the court finds that this unusual procedure has been appropriate in the unique context of this case, as petitioner's counsel have provided extensive and learned assistance,

while petitioner has been afforded every opportunity to put before the court all claims which he contends had been previously ignored.

127. In the pro per petition filed in 90-0291-B on March 7, 1990, and the pro per amendments thereto, filed on October 18, 1990, petitioner has raised four grounds in support of his request for relief: (1) false representation of the facts and evidence by the prosecution; (2) ineffective assistance of counsel at trial and on appeal; (3) denial of right to self-representation; (4) denial of the right to fair trial and due process.

128. Petitioner's first claim, false representation of the facts and evidence by the prosecution, alleges that the district attorney improperly introduced the knife, saw, and rope, and further alleges that the district attorney

"covered up" perjury by deputy coroner Cogen.

129. Petitioner's second claim, ineffective assistance of counsel, alleges that trial and appellate counsel failed to investigate certain evidentiary items. This claim also raises the issue of Ryan's shackling request and Ryan's trial performance.

130. Petitioner's third claim, denial of the right to self-representation, alleges that the trial judge improperly denied petitioner's timely Faretta motions.

131. Petitioner's fourth claim, denial of the right to a fair trial and due process, alleges that the trial court was prejudiced against petitioner, improperly admitted certain evidentiary items, improperly instructed the jury, and systematically excluded black jurors. Moreover, petitioner alleges that the

California Supreme Court exceeded its scope of review upon remand in Hamilton II, and improperly denied his motions to relieve or appoint specified counsel on four occasions. Finally, petitioner alleges in this claim that the California Appellate Project utilized racial prejudice in appointing counsel for petitioner in February, 1990.

132. This court has carefully considered the extremely limited factual allegations supporting each ground for relief, and has reviewed the trial record in connection with each of petitioner's pro per claims.

B. Conclusions of Law

72. Petitioner's allegations concerning the district attorney's introduction of the knife, rope, and saw were raised by counsel, and are foreclosed by this court's ruling that the admission of this evidence did not

deprive petitioner of a fair trial. See supra Conclusions of Law 44-46. Moreover, petitioner's claim that the district attorney engaged in a "cover-up" of perjured testimony is unsupported by any evidence in the trial record or the evidentiary hearing record, and must be summarily dismissed.

73. Petitioner's claim of ineffective assistance of trial counsel was raised by counsel and is foreclosed by this court's ruling that petitioner was represented in an effective and constitutional manner. See Conclusions of Law 14, 23-26. The court recognizes that the pro per petition asserts a number of alleged investigative and performance failures that were not discussed above. However, upon review of these allegations, the court finds that petitioner has failed to raise a constitutional issue inasmuch as each allegation involves evidentiary

minutiae and does not even approach the standard of incompetence and prejudice articulated in Strickland. To the extent petitioner contends that appellate and/or habeas counsel were also deficient for failing to investigate these issues, the same conclusion applies.

74. Petitioner's Faretta claim was raised by counsel and is squarely foreclosed by this court's ruling that petitioner moved to represent himself in an equivocal manner and for purposes of delay. See Conclusions of Law 36-43.

75. Petitioner's claim that the trial court improperly admitted evidence was raised by counsel and is foreclosed by this court's ruling that the evidence was legally admissible and the trial was conducted in a procedurally fair manner. See Conclusions of Law 44-46. The court recognizes that the pro per petition addresses certain evidentiary

decisions not raised in counsel's petition. However, the court concludes that the questioned rulings involve discrete evidentiary items and do not implicate petitioner's constitutional right to a fair trial.

76. Petitioner's attack on the jury instructions was raised by counsel and is foreclosed by this court's prior ruling that the instructions were not unconstitutional. See Conclusions of Law 57, 64, 69. Likewise, petitioner's attack on the California Supreme Court's decision in Hamilton II was raised by counsel and is foreclosed by this court's ruling that the decision was a lawful exercise of that court's power. See Conclusions of Law 47-52.

77. Petitioner has presented absolutely no evidence indicating that the trial judge was prejudiced against him or that black

jurors were systematically excluded from the jury. These very serious charges are made in a conclusory fashion in the pro per petition, and are totally unsupported in the record. Therefore, these claims warrant summary dismissal.

78. Petitioner's claim that the California Supreme Court improperly denied his motions to relieve or appoint counsel are unsupported by the record and do not raise constitutional issues. These claims reflect petitioner's misguided belief that he is entitled to counsel of his choice throughout appellate and habeas proceedings. The constitution does not afford petitioner this luxury, and his claims are wholly without merit. Likewise, petitioner's claim that the California Appellate Project utilized racial prejudice in appointing him counsel is unsupported by any evidence. These claims warrant summary dismissal.

79. As noted above, many of the pro per claims raised by petitioner were pursued by counsel and have already been addressed by this court. With respect to the claims prosecuted by petitioner in propria persona, this court concludes that said claims are unsupported by any evidence and/or do not state issues of constitutional magnitude. Instead, these claims reflect petitioner's willingness to assert frivolous claims in an effort to delay the proceedings, manipulate the judicial system, and obfuscate the real issues. This court's reading of the trial record indicates that this has been petitioner's objective since he was first arrested and launched the "Fran and Spider" story.

XI. CLAIMS WHICH ARE SPECIFICALLY BARRED FROM SUBSEQUENT PETITIONS

A. Findings of Fact

133. As discussed above, see supra p. 4, petitioner was ordered by this court on March 6, 1990 to identify all potential habeas claims of which he was aware. On June 8, 1990, petitioner filed a list of 36 potentially new claims. Subsequently, petitioner was given until October 22, 1990 to file any unexhausted claims in state court and any exhausted claims in federal court. This court ruled that any claims not brought by the deadline were waived and abandoned.

134. The following claims were identified in petitioner's list of potential claims filed with this court on June 8, 1990: (1) failure to investigate the Jessie Moffett theory; (2) petitioner's inability to communicate effectively with counsel by reason of

mental or emotional impairment; (3) counsel's failure to raise this inability; (4) denial of expert psychiatric assistance; (5) introduction of evidence obtained by government officials incident to petitioner's unlawful arrest; (6) introduction at trial of petitioner's statement to Deputy Parsons in violation of the fifth amendment; (7) introduction at trial of petitioner's statement to a police informant; (8) unlawful jury instruction stating that adverse inferences could be drawn from petitioner's failure to explain or deny evidence against him during his testimony; (9) ineffective assistance of counsel based on trial counsel's failure to seek a change of venue; (10) selection of jury in a manner that violated the right to a jury representing a fair cross-section of the community; (11) improper exercise of peremptory challenges by prosecution; (12)

improper communication between trial court and jurors outside of presence of counsel; (13) excessive security during trial; (14) improper admission of (a) knife, saw, and rope, (b) petitioner's 1972 burglary conviction; (c) petitioner's statements to Donna Hatch; (d) petitioner's letter to Terry Buchanan; (e) petitioner's letter to Theresa Roch; (15) improper admission into evidence of preliminary hearing testimony of Stephen Terry; (16) improper denial of Faretta motions; (17) improper admission of petitioner's 1972 burglary conviction (repeat of 14(b)); (18) trial court's failure to instruct jury on theft as a lesser included offense of robbery; (19) improper jury instruction indicating that petitioner's 1972 burglary conviction could be used as evidence of motive; (20) improper jury instruction indicating that evidence of the presence of motive could tend to establish guilt; (21) improper

jury instruction that flight after the commission of a crime may be considered as consciousness of guilt; (22) improper jury instruction on malice aforethought; (23) use of unconstitutional felony murder and special circumstances statute; (24) imposition of death penalty in a disproportionate and discriminatory manner when compared with sentences in other cases involving defendants and victims of other races; (25) improper burglary instruction; (26) improper jury instruction indicating that auto burglary may serve as a basis for first degree felony murder and special circumstances; (27) improper exclusion of documentary film during sentencing phase; (28) improper penalty phase instructions that precluded the jury from considering and giving effect to all relevant mitigating evidence; (29) failure to instruct the jury that death penalty verdict could be

returned only if death was the appropriate penalty beyond a reasonable doubt; (30) failure to instruct the jury that a death sentence can also be commuted by the governor; (31) failure to instruct the jury that robbery, burglary, and kidnapping should be regarded as a single special circumstance; (32) refusal of the court to exclude aggravating factors that were not listed on the prosecutor's notice of aggravation; (33) improper instruction on irrelevant mitigating factors and prosecutor's argument pointing out absence of such factors; (34) prosecutorial misconduct in penalty phase argument; (35) ineffective assistance of counsel with respect to investigation and presentation of potential mitigating factors; and (36) to the extent any of the above claims were not preserved, ineffective assistance of trial and appellate counsel for failing to preserve such claims.

135. Of the 36 potential claims identified on June 8, 1990, only the following five were presented to this court prior to the October 22, 1990 deadline: (6) improper admission of statement to Deputy Parsons; (11) improper use of peremptory challenges by prosecution; (14) improper admission of certain evidentiary items; (16) improper denial of Faretta motions; and (28) improper penalty phase instruction that limited jurors' consideration of mitigating evidence. Each of these claims, and all other exhausted claims presented to the court in a timely manner, have been considered by the court. None of the other claims identified above were presented to this court prior to the October 22, 1990 due date.

136. One of the claims identified by petitioner on June 6, 1990, the alleged "Jessie Moffett theory," was

raised by petitioner nearly thirteen months later, in support of his Application for Stay of Proceedings, filed with this court on July 1, 1991. This application came approximately two months after the evidentiary hearing conducted by this court was concluded, and marked the first time that petitioner ever attempted to develop the Moffett theory before this court, despite its identification in June, 1990, and despite petitioner's admission that he received discovery giving rise to the theory in March, 1990. This court denied the application for stay, finding that petitioner's wilful disregard of the October 22, 1990 deadline required that the Moffett theory be deemed waived and abandoned. See Order, August 19, 1991. Petitioner's attempt to raise the claim at this stage of the proceedings reflects an attempt to file seriatim petitions and

amendments, and is precluded by this court's earlier orders.

B. Conclusion of Law

80. Those claims listed above and not presented to this court prior to the October 22, 1990 deadline are hereby deemed waived and abandoned pursuant to this court's order of September 18, 1990. This ruling specifically encompasses all claims listed in Finding of Fact 132, as well as any other claims of which petitioner was aware, which were not filed with this court prior to October 22, 1990.

XII. Conclusion

This court recognizes its role as a guardian of those constitutional rights guaranteed to every criminal defendant. Of course, in a capital case the importance of this role is magnified by an immeasurable amount. Accordingly, the court has given its maximum consideration

to every claim raised by petitioner, and has done everything in its power to analyze whether petitioner's trial was conducted in a constitutional manner.

Without prejudicing the valid rights of respondents, this court has endeavored to afford petitioner every opportunity to present all claims to this court on a fully developed record. This effort included a three week evidentiary hearing which only concluded when petitioner rested. Meanwhile, the state has been, forced to answer and litigate many issues of dubious constitutional importance, all the while holding a judgment of death that now approaches its eleventh anniversary.

After carefully considering every claim presented, this court is convinced that petitioner received a fair trial and was convicted and sentenced in a constitutional manner. For all of the reasons described above, the amended and

consolidated petitions for writ of habeas corpus are hereby denied.

IT IS SO ORDERED.

DATED: 8-23-91
3:30 pm

/S/ RUDI M. BREWSTER
UNITED STATES DISTRICT JUDGE

Hamilton v. Vasquez and Lungren
Civ. No. 86-2102-B and Civ. No. 90-0291-B
Order Denying Petitions for Writ of Habeas Corpus; Findings of Fact and Conclusions of Law

Copies to: RICHARD CAMINO, Esq.
17541 East 17th St.,
2nd Floor
Tustin, CA 92680

PETER H. BENZIAN, Esq.
701 B Street, Suite 2100
San Diego, CA 92101

PAT ZAHAROPOULOS, Esq.
Deputy Attorney General
State of California
110 West A St., Suite 700
San Diego, Ca 92101

APPENDIX B

FILED

A-166

JUL - 7 1992

NOT FOR PUBLICATION

CATHY A. CATTERSON, CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BERNARD LEE HAMILTON, Petitioner-Appellant, v. DANIEL VASQUEZ, Warden of San Quentin; THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees.	) Nos. 91-56251) 91-56252) 91-56295) DC# CV-86-2102-RMB) CV-90-291-RMB) (Southern California))) ORDER

Before: SCHROEDER, FLETCHER and TROTT, Circuit Judges.

Petitioner's counsel have moved this court to remand this appeal to the district court to allow the district court to consider petitioner's Rule 60(b) motion filed in the district court. The district court has entered an order expressing its willingness to consider the motion. Accordintly, we make a limited remand to enable the district court to consider the motion.

The district court shall keep this court advised on an ongoiung basis as to the hearing schedule it sets and any actions it takes on the motion.

In the meantime, petitioner shall proceed as scheduled to file his pro se supplemental brief.

The State shall adhere to its briefing schedule in this court unless it moves this court for an extension to allow it more time to respond to the district court's aciton upon the 60(b) motion.

Depending upon the action taken by the district court in respect to the 60(b) motion, this court may make further orders that might take the form of a full remand, a further briefing order, or a combination. This court in this appeal will provide whatever opportunity is necessary to all parties to respond to the district court's actions on the 60(b) motion.

A copy of this order shall serve as the mandate for the limited purpose of this order.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Bernard Hamilton,
Petitioner,

Case nos.
86-2101-B(BTM)
90-0291-B

v.

Dan Vasquez, Warden of San Quentin, and John Van De Kamp, Attorney General of the State of California,

Respondents.

ABANDONMENT OF KNOWN HABEAS CORPUS CLAIMS

I, Bernard Hamilton, hereby waive and/or abandon any and all of my rights to all presently known habeas corpus claims in the above named court and in the above numbered cases except as follows:

1. All claims raised in this court under case numbers 86-2101-B(BTM) and 90-0291-B;

2. All new claims that may not become known to either myself or my counsel until after this date;

3. All new claims that may become known after this date to myself or to my counsel due to newly established law or case-law and/or newly discovered evidence.

Dated: August 13, 1990

Signed: /s/ Bernard Hamilton
Bernard Hamilton
P.O. Box C-27300
Tamal, Ca 94974-000162

verification

I, Bernard Hamilton, declare under penalty of perjury that I am the above named petitioner, that the foregoing is true and correct, and that I believe that I am entitled to waive and/or abandon the rights so described above.

Executed on August 13, 1990 at Tamal, California

Signed: /s/ Bernard Hamilton
Bernard Hamilton

APPENDIX D

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BERNARD HAMILTON, Petitioner, vs. J.R. COGEN, DAVID J. STARK, FRANK SEXTON, THOMAS McCARDLE, C.R. RING NORMAN CRAWFORD, JOSEPH CELLUCI, BRANDON ARMSTRONG, SHERIFF JOHN DUFFY, LIEUTENANT MOYER, Defendants.	)	Civ. No. 90-0301(B) (IEG) ORDER RE EXHAUSTION OF CLAIMS AND WAIVER/ ABANDONMENT OF UNASSERTED CLAIMS

On August 21, 1990, at 4:00 p.m., this court held a status conference in the above-mentioned case upon Petitioner's request. Holly Wilkens, Esq., appeared for the Attorney General of the State of California. Richard Camino, Esq., and Peter Benzian, Esq., appeared for Petitioner, Bernard Hamilton.

The reason for this Order is to eliminate any ambiguity or uncertainty surrounding the consolidation and

consideration by this court of all of Petitioner's habeas corpus claims in the above consolidated cases. It is the intention of this court to handle in only one federal habeas corpus proceeding, all of Petitioner's habeas corpus rights that have been exhausted on the state side, and to preclude seriatim habeas corpus petitions.

Petitioner's counsel have represented to this court that they have recommended to Petitioner, and Petitioner has authorized the immediate abandonment and dismissal of the appeal presently pending before the United States Court of Appeals in case No. 88-1148-B. The Court observes that the later filed petition, 90-0291-B, sets forth the same issues, plus one additional issue, and that case has been consolidated previously with the case No.86-2101-B, which was designated the master file.

1. The date of August 20, 1990, previously set by this court on August 2, 1990, as the last day for petitioner to file all unexhausted state habeas corpus claims, is hereby vacated.

2. The Attorney General may file, no later than September 17, 1990, its identification of known but unfiled potential state and federal habeas corpus claims which Petitioner has set forth in all prior pleadings, letters, memoranda and declarations, including but not limited to all previously filed federal petitions for habeas corpus, petitioner's application for Stay of Execution (case no. 86-2101-B) filed August 2, 1990, Petitioner's Identification of Potential Habeas Corpus Claims Pursuant to Court's March 6, 1990 Order, Petitioner's Abandonment of Known Habeas Corpus Claims filed August 16, 1990, and all other records, pleadings, and papers in all of

Petitioner's federal and state habeas corpus actions.

3. Petitioner may file new federal habeas corpus claims, if any he has, from exhausted state claims, in an amended petition in Civil Case No. 86-2102-B in this court no later than October 22, 1990.

On October 22, 1990, at 5:00 p.m., without further order from this court, Petitioner will have voluntarily, knowingly, and intentionally waived and abandoned any and all of the following:

(a) habeas corpus claims not yet filed in state court; and

(b) habeas corpus claims that have been exhausted in state court, but not yet filed in federal court.

4. Petitioner must file new unexhausted state habeas corpus claims, if any he has, no later than October 22, 1990, at 5:00 p.m. If any such claims are filed, or upon the discovery of any state

claims previously filed and still pending, this court will further stay consideration of the consolidated federal habeas corpus petitions until all the state claims are exhausted.

5. This court has received and filed Petitioner's "Abandonment of Known Habeas Corpus Claims," dated August 13, 1990. The court interprets this document to be an attempted knowing waiver and abandonment by Petitioner of all potential habeas corpus claims presently known to Petitioner or Petitioner's counsel. It was filed without signature or knowledge of either of Petitioner's counsel. This paper does not alter any of the preceding provisions of this Court's order herein.

IT IS SO ORDERED.

DATED: September 18 1990

/S/ RUDI M. BREWSTER
UNITED STATES DISTRICT JUDGE

Bernard Hamilton vs. J.r. Cogen, et al.
Civil No. 90-0301-B(IEG)
Order re Exhaustion of Claims and
Waiver/Abandonment of Unasserted Claims

Copies to: Bernard Hamilton
P. O. Box C27300
Tamal, California 94974-0001

MORRIS G. HILL, Deputy County Counsel
1600 Pacific Highway, Room 355
San Diego, California 92101-2469

APPENDIX E

MR. CAMINO: I understand

THE COURT: It has no bearing on anything.

(Pause.)

MR. CAMINO: I understand, your Honor. Thank you.

THE COURT: Anything else, Mr. Camino?

MR. BENZIAN: Your Honor, we have nothing further at this time.

THE COURT: Very well.

MR. BENZIAN: May I make one brief statement, your Honor, and then I am going to submit a writing that I think will try to set out the position more fully.

As I say, we have no further witnesses to offer at the evidentiary hearing. We would request, however, in light of the McCloskey case, the recent Supreme Court decision that came down just as our evidentiary hearing started, that the Court not close the hearing or issue a

ruling on the current petition, at least for another 60 to 90 days, so that we can complete additional investigations that are currently ongoing, so that we might bring, if appropriate, motions to amend, to expand, the current petitions.

I recognize, your Honor, all of the past rulings and I'm simply trying to preserve the record in light of the McCloskey case and I'm going to try to set out this position more fully in a writing.

I just wanted to make that point known and we have no further witnesses.

MS. ZAHAROPOULOS: Your Honor, I strongly object to that procedure, because, as you know, over a year and a half ago now we brought a motion to the Defendant to bring forward all of his claims or lose them, because Court has issued such an order, asking him to bring forward his claims or waive them, and that order was filed by this Court and an

amended petition was accepted by this Court and we're kind of tired of dealing with this case.

I don't think further investigation and further issues are proper at this time. He has waived all issues that were not brought up by the amended petition last October.

THE COURT: The Court is not going to further hold open the petition for amended petitions to be added. This case is operating under the law of the case that this Court established in this case before McCloskey was decided by the United States Supreme Court.

This Court views McCloskey as being harmonious with the orders that this Court entered months ago. So, this Court does not perceive any impact from McCloskey on our case.

It doesn't change any assumptions, any hopes, aspirations, or plans of the

Petitioner in this case. The order that this Court entered in McCloskey must McCloseky in space, and this Court, before ordering that, as I recall, made two or three different continuances for more than 120 to 150 days allowed, amendments of the petition, allowed and accepted petitions by the Petitioner directly, as well as by his counsel, deferred, delayed, permitted court exhaustion, permitted two or three different hearings, to make sure that everything had been brought before this Court.

At that point, the order was in and this Court is not going to change that order.

So, I understand and you've made your record, but the motion to once again reopen the petition is denied.

Now, the question is, when can we -- I want to hear from counsel. I would

appreciate summation and I would like to hear that Tuesday morning.

(Pause.)

[EVIDENTIARY HEARING HELD 4-2-91 THROUGH 5-9-91; EXCERPT FROM XRT 189-191 DATED 5/9/91]

APPENDIX F

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BERNARD HAMILTON, Petitioner, vs. DANIEL VASQUEZ, Warden of San Quentin, and DANIEL LUNGREN, Attorney General of the State of California, Respondents.	Civ. No. 86-2101-B Consolidated with Civ. No. 90-0291-B ORDER DENYING PETITIONER'S MOTION TO RELIEVE COUNSEL; DENYING PETITIONER'S REQUEST FOR A SUBPOENA; DENYING PETITIONER'S MOTION TO STRIKE TESTIMONY; DENYING PETITIONER'S MOTION FOR LEAVE TO FILE A MOTION FOR SUMMARY JUDGMENT; DENYING PETITIONER'S APPLICATION FOR STAY OF PROCEEDINGS

The court is in receipt of the following motions, requests, and applications: (1) petitioner's Motion to Relieve or Substitute Counsel, filed in propria persona on July 1, 1991; (2) petitioner's Request for Subpoena and/or for Court Order for Production of Crime/Investigative Reports and Arrest Warrant, filed in propria persona on July

17, 1991; (3) petitioner's Motion to Strike Testimony, filed in propria persona on July 17, 1991; (4) petitioner's Motion for Leave to file Motion for Summary Judgment, filed in propria persona on July 29, 1991; and (5) petitioner's Application for Stay of Proceedings, filed by petitioner's counsel on July 1, 1991.

Upon consideration of the above referenced motions, requests, and applications, the court hereby orders the following order:

I. Motion to Relieve/Substitute Counsel

Petitioner again attacks the competence of his appointed habeas counsel, claiming that "[c]ounsels have repeatedly acted to omit and ignore several important claims/issues that I have raised in the filing of my original petitions." Motion to Relieve, p. 1. This is petitioner's third motion to relieve counsel since October, 1990. As

before, petitioner has not described any persuasive ground for relieving counsel. This court reiterates its belief that counsel are performing in a diligent and effective manner on petitioner's behalf. The court's conviction in this regard has been strengthened by the court's observation of counsels' performance during the recently conducted three week evidentiary hearing, and the court's review of counsels' 187 page post-hearing brief.

Moreover, to the extent petitioner argues that counsel are not presenting all claims to this court, the court holds that this contention is without merit. Undoubtedly, counsel have made strategic and tactical choices with respect to the claims presented in the petition and during the evidentiary hearing. The court, of course, does not inquire into

these choices nor act as an overseer of counsel's strategy.

However, anticipating petitioner's perpetual dissatisfaction with tactical choices made by counsel, this court has allowed petitioner to proceed in propria persona on those claims which counsel have not raised and petitioner believes to be meritorious. To the extent such claims are appropriately before the court, they will be considered. Therefore, the motion is denied.

II. Motion for Subpoena and/or for Court Order

By this motion, petitioner seeks all investigative reports generated by the Sheriff's office in connection with the subject murder, as well as the warrant for his arrest and the supporting affidavits. Petitioner apparently believes that these documents will support certain claims raised by petitioner involving

prosecutorial misconduct, ineffective assistance of counsel, and his right to a fair trial.

Petitioner's request for a subpoena is clearly untimely, and petitioner offers not credible reason for the delay. Moreover, petitioner has not demonstrated even prima facie evidence suggesting (a) that the relevant documents were not provided by the state prior to trial; and (b) that the relevant documents contain any exculpatory information. See Brady v. Maryland, 373 U.S. 83 (1963). Accordingly, this motion is denied.

III. Motion to Strike Testimony

Petitioner complains that certain testimony given during the recently completed evidentiary hearing is inconsistent with the trial record. As mandated by law, the court will consider any such inconsistencies and make credibility determinations in its review

of the evidence. However, there is no good cause for striking such testimony, and therefore the motion is denied.

IV. Motion for Leave to File Motion for Summary Judgment

Apparently, petitioner's theory here is that he raised several issues in his pro per petition to which the state has not responded. See, Motion for Leave, p. 2 ("It is respondent whom has failed to address several of the claims that I did raise. Those claims not addressed by respondent are claims in which (sic), if true, would entitle me to relief.").

As noted above, this court is presently considering all appropriate claims raised in the amended petitions filed by petitioner and by petitioner's counsel. The court's eventual ruling will encompass all issues properly raised, and none of the claims raised by petitioner in this motion are appropriate for summary

adjudication in his favor. Accordingly, petitioner's motion for leave to file motion for summary judgment is denied.[13/]

V. Application for Stay of Proceedings

Petitioner's counsel requests a 120 day stay of these proceedings to allow petitioner to conduct additional discovery concerning alleged new evidence. Petitioner's counsel have portrayed this request as an effort to comply with the Supreme Court's recent pronouncement expanding the concept of waiver in the context of habeas corpus claims. See McCleskey v. Zant, 111 S.Ct. 1454 (1991).

At the outset, it must be noted that the petition presently pending before this court is an amended and consolidated first federal petition that does not require application of the McCleskey cause and

---

13. In light of this ruling, petitioner's Motion for Summary Judgment and Motion for Entry of Summary Judgment have been lodged with the court, but not filed.

prejudice standard. In other words, this court does not sit as a McCleskey court reviewing the propriety of a second petition. However, petitioner urges that the McCleskey ruling requires this court to afford him more leeway in investigating any potential claims that may now be available for inclusion in his first petition. The gravamen of petitioner's argument is that because McCleskey will require more from him on any second petition, this court must grant him leave to expand his investigation on the first petition.

Without passing on the merits of petitioner's legal theory,[14] the court

---

14. However, the court notes its belief that petitioner's use of McCleskey in this context is problematic. If accepted, petitioner's contention might cause interminable delays in the consideration of first petitioners so that the abuses caused by successive petitions are cured. It is difficult to infer that McCleskey countenances such a trade-off, as the Court's discussion clearly reflected an

concludes that with or without McCleskey petitioner is not entitled to a stay of the proceedings under these circumstances. The information giving rise to the application for stay was turned over to petitioner in March, 1990. The deadline for petitioner to amend and consolidate his claims in this court was October 22, 1990, and petitioner was explicitly informed by this court that any claims not raised in the amended petition would be waived and abandoned. The court imposed this procedure in order to avoid seriatim petitions and amendments, which typically create delay and interfere with the orderly administration of justice.

---

overriding concern with the general prospect of delay in habeas proceedings. There is no language in McCleskey explicitly or implicitly suggesting that the additional burdens imposed by the new standard require a commensurate expansion of petitioner's rights on the first petition.

Nevertheless, despite having the information underlying the claim as early as March, 1990, and despite being on notice of this court's procedure, the new claim was not brought to the court's attention until July 1, 1991. Because petitioner did not comply with this court's order with respect to this claim, it must be considered waived and abandoned.[15] Therefore, the court will not stay the proceedings to allow for further investigation of this specific claim.[16]

---

15. The court has not commented on the merits of the specific allegation made by petitioner because the court has granted petitioner's request that the affidavit describing the claim be sealed. However, the court observes that the claim is highly speculative under the circumstances of this case.

16. Because of this ruling, the court need not reach the issue of whether petitioner is entitled to investigative funds pursuant to the Criminal Justice Act or any other federal statute.

Moreover, to the extent petitioner seeks a blanket stay permitting an open-ended investigation of any potential claims, see, Benzian Declaration, para. 12-13, this request is also denied. In effect, petitioner requests that this court allow these proceedings to remain open indefinitely while petitioner investigates claims for which there is presently no supporting evidence. The court declines this invitation. Petitioner was arrested in 1979, and the extent of the pre-trial and post-trial investigation undertaken on his behalf has been extensive and painstaking. No grounds have been presented to this court indicating that further investigation into vaguely defined subjects would be proper or necessary.

For these reasons, the application for stay is denied.

IT IS SO ORDERED.

DATED: 8-19-91

/S/ RUDI M. BREWSTER
UNITED STATES DISTRICT JUDGE

Copies to: Richard Camino, Esq.
17541 East 17th St.,
2nd Floor
Tustin, CA 92680

Peter Benzian, Esq.
701 B Street, Suite 2100
San Diego, CA 92101

Pat Zaharopoulos
Deputy Attorney General
State of California
110 West A St., Suite 700
San Diego, CA 92101

APPENDIX G

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BERNARD HAMILTON, Petitioner, vs. DANIEL VASQUEZ, Warden of San Quentin and DANIEL LUNDGREN, Attorney General of the State of California, Respondent.	Civ. No. 86-2102-B 90-0291-B ORDER DENYING PETITIONER'S MOTION TO ALTER OR AMEND THE JUDGMENT AND/OR FOR NEW EVIDENTIARY HEARING

This court is in receipt of Petitioner's Motion to Alter or Amend the Judgment and/or for a New Evidentiary Hearing. The Motion contains no new information that was not before this court when it denied Petitioner's petition for writ of habeas corpus. All of the issues raised by the petitioner have already been considered.

Accordingly, the Motion is Denied.

IT IS SO ORDERED.

DATED: October 29 1991

/S/ RUDI M. BREWSTER
UNITED STATES DISTRICT JUDGE

APPENDIX H

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BERNARD LEE HAMILTON, Petitioner, v. DANIEL VASQUEZ, Warden of San Quentin and JOHN K. VAN DE KAMP, Attorney General of the State of California Respondents.	Civil No. 86-2102-B 90-0291-B ORDER STATING WILLINGNESS TO ENTERTAIN RULE 60(b) MOTION

Upon consideration of petitioner's March 17, 1992 Request (by and through counsel) for Statement by District Court that it is Willing to Entertain the Motion for Relief for Judgment Pursuant to Rule 60(b), the Honorable Rudi M. Brewster hereby orders as follows:

(1) This court is willing to entertain the Rule 60(b) motion;

(2) Petitioner may seek remand from the Ninth Circuit to restore jurisdiction

to this court for consideration of the Rule 60(b) motion. Long v. Bureau of Economic Analysis, 646 F.2d 1310, 1318 (9th Cir. 1981) ("To seek Rule 60(b) relief, the proper procedure is to ask the district court to indicate whether it wishes to entertain the motion, or to grant it, and then move this court, if appropriate, for remand of the case.");

(3) Petitioner's appointed counsel is to provide petitioner with copies of all filings made on his behalf.

The court will consider Petitioner's Rule 60(b) Motion along with Mr. Hamilton's own April 15, 1992 Motions to Dismiss the Petition without Prejudice and to Relieve Counsel when this court's jurisdiction over the case is restored by the Ninth Circuit's remand of this case.

IT IS SO ORDERED.

DATED: June 1, 1992

/S/ RUDI M. BREWSTER
UNITED STATES DISTRICT JUDGE

Copies to:

Bernard Lee Hamilton
P.O. Box C-27300
Tamal, CA 94970-0001

Pat Zaharopoulos, Esq.
Office of the Attorney General
110 West A Street, Suite 700
San Diego, CA 92101

Peter Benzian, Esq.
Latham & Watkins
701 B Street, Suite 2100
San Diego, CA 92101

Richard Camino, Esq.
17541 East 17th Street, 2nd Floor
Tustin, CA 92680

APPENDIX I

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BERNARD HAMILTON, Petitioner, vs. DANIEL VASQUEZ, Warden of San Quentin, et al Respondents.	Civ. No. 90-0291-B ORDER SETTING BRIEFING, SCHEDULE FOR PETITIONER'S MOTIONS FOR RECONSIDERATION AND LEAVE TO FILE AMENDED PETITION

Petitioner's Motions for Reconsideration of Court's August 23, 1992 order and for Leave to File An Amended Petition shall be heard at 2 p.m., August 26, 1992. Petitioner and petitioner's counsel may file and serve any additional moving briefs on or before July 29, 1992. Respondents may serve and file their opposition on August 12, 1992. Reply papers may be filed and served on or before August 19, 1992.

IT IS SO ORDERED.

DATED: _____

/S/ RUDI M. BREWSTER
UNITED STATES DISTRICT JUDGE

APPENDIX J

FILED
JUL 31 1992

A-209

CATHY A. CATTERSON,
CLERK, U.S.
COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BERNARD LEE HAMILTON, Petitioner-Appellant, vs. DANIEL VASQUEZ, Warden of San Quentin; THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees.	) No. 91-56251, et al)) DC# CV-86-2102-RMB CV-90 291-RMB)) ORDER

Before: SCHROEDER, FLETCHER AND TROTT Circuit Judges

Appellee's Motion to Recall Mandate and Petition for Reconsideration are denied.

Supreme Court, U.S.
FILED
SEP 9 1992
OFFICE OF THE CLERK

No. 92 - 265

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

DANIEL VASQUEZ, Warden of
San Quentin Prison and
DANIEL E. LUNGREN,
Attorney General of the
State of California,

Petitioners,

v.

BERNARD LEE HAMILTON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (MARY M. SCHROEDER, BETTY B. FLETCHER, AND STEPHEN S. TROTT, CIRCUIT JUDGES) AND FOR WRIT OF PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA (RUDI M. BREWSTER, DISTRICT COURT JUDGE)

PETER H. BENZIAN
Latham & Watkins
701 B Street, Suite 2100
San Diego, California 92101-8197
Telephone: (619) 236-1234

Attorney for Respondent

RICHARD CAMINO
17541 East 17th Street, Second Floor
Tustin, California 92680
Telephone: (714) 832-6620

TABLE OF CONTENTS

		Page
I.	STATEMENT OF THE CASE	3
II.	SUMMARY OF ARGUMENT	14
III.	ARGUMENT	15
	A. THERE IS NO NEED FOR RELIEF BY WAY OF EXTRAORDINARY WRIT	15
	B. NINTH CIRCUIT REMAND TO ALLOW DISTRICT COURT TO CONSIDER RULE 60(b) MOTION AFTER IT STATED ITS WILLINGNESS TO DO SO WAS APPROPRIATE	17
	C. RULE 60(B) IS APPROPRIATE IN HABEAS PROCEEDINGS	20
IV.	CONCLUSION	24

TABLE OF AUTHORITIES

CASES **Page(s)**

Allied Chemical Corp. v. Daiflon, Inc.,
449 U.S. 33 (1980) 15

Bankers Life & Cas. Co. v. Holland,
346 U.S. 379 (1953) 16

In re Blodgett,
502 U.S. __, 116 L.Ed.2d 669,
112 S.Ct. 674 (1992) 22

Carriger v. Lewis,
__ F.2d __, 92 DAR 10417
(9th Cir. 7/28/92) 18

Carriger v. Lewis,
__ F.2d __, 92 DAR 10417
(9th Cir. 7/28/92) 21

Gray v. Estelle,
574 F.2d 209 (5th Cir. 1978) 21

Hamilton v. Vasquez,
882 F.2d 1469 (9th Cir. 1989) 4

High v. Zant,
916 F.2d 1507 (11th Cir. 1990) 21

Kerr v. United States District Court,
426 U.S. 394 (1976) 15

Long v. Bureau on Economic Analysis,
646 F.2d 1310 (9th Cir. 1981),
vacated on other grounds,
454 U.S. 934 (1981) 11, 18

May v. Collins,
961 F.2d 74 (5th Cir. 1992) 21

CASES **Page(s)**

McCleskey v. Zant,
499 U.S. __, 111 S.Ct. 1454,
113 L.Ed.2d 517 (1991) 8, 11, 19

Neuschafer v. Whitley,
860 F.2d 1470
(9th Cir. 1988) 4, 5, 6, 12

Pitchess v. Davis,
421 U.S. 482 (1975) 21

Richmond v. Ricketts,
774 F.2d 957 (9th Cir. 1985) 5

Robison v. Maynard,
958 F.2d 1013 (10th Cir. 1992) 21

Roche v. Evaporated Milk Assn.,
319 U.S. 21 (1943) 15

Sanders v. United States,
373 U.S. 1 5

Silagy v. Peters,
905 F.2d 986 (7th Cir. 1990) 22

Smith v. Lujan,
588 F.2d 1304 (9th Cir. 1979) 11, 18

Teague v. Lane,
489 U.S. 288 (1989) 23

RULES

Rules Governing § 2254 Proceedings

Rule 9(b) 7, 20

Rule 11 20

Federal Rules of Civil Procedure

Rule 60(b) 2, et passim

Rule 60(b)(1) 12

United State Supreme Court Rules

Rule 20.1 16

No. 92 - 265

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

DANIEL VASQUEZ, Warden of
San Quentin Prison and
DANIEL E. LUNGREN,
Attorney General of the
State of California,

Petitioners,

v.

BERNARD LEE HAMILTON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (MARY M. SCHROEDER, BETTY B. FLETCHER, AND STEPHEN S. TROTT, CIRCUIT JUDGES) AND FOR WRIT OF PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA (RUDI M. BREWSTER, DISTRICT COURT JUDGE)

Petitioners seek a writ of mandamus to compel the United States Court of Appeals for the Ninth Circuit to vacate its limited remand to the United States District Court for the Southern District of California (hereinafter "district court"), and a writ of prohibition to

prevent the district court from conducting a hearing or ruling upon a motion for relief from judgment pursuant to Rule 60(b) of the Rules of Civil Procedure. Petitioners' application to stay the district court proceedings scheduled for August 25, 1992, to permit this Court to rule upon their petition prior to the hearing was denied. The district court heard the matter as scheduled, and denied the Rule 60(b) motion. A written order denying the Rule 60(b) motion has not yet been entered.

Because the proceedings which petitioners sought to prevent have occurred, and because the district court ruled in petitioners' favor, the petition before this Court should be denied as moot. There is no longer any need for this Court to issue a writ prohibiting the district court from proceeding on the matter since the district court has

already ruled. Nor is there any basis for this Court to issue a writ of mandamus to compel the Ninth Circuit to vacate its limited remand since the case will be returned to the Ninth Circuit, where any issue as to the appropriateness of the Rule 60(b) proceedings may be considered in the appeal. If the Ninth Circuit concludes that the district court erred in denying the 60(b) motion, petitioners will have the opportunity to ask this court to issue a writ of certiorari.

I. STATEMENT OF THE CASE

Petitioners' statement of the case contains several misstatements and distortions of the record requiring respondent Hamilton to more accurately set forth a statement of the case.

On April 23, 1989, the Ninth Circuit reversed and remanded the denial of Hamilton's second pro se petition, with instructions for the district court to

undertake an independent review of the state court record and consider holding an evidentiary hearing in order to determine whether Hamilton's shackling denied him a fair trial. See Hamilton v. Vasquez, 882 F.2d 1469 (9th Cir. 1989).

On March 6, 1990, the district court ordered Hamilton's counsel to identify all claims to be raised on habeas corpus in a procedure derived from Judge Alarcon's concurring opinion in Neuschafer v. Whitley, 860 F.2d 1470, 1482 (9th Cir. 1988). The district court ordered Hamilton's counsel to identify all additional claims that may be raised on habeas corpus, and cautioned that the deliberate failure to inform the court of any known claims might result in the application of abuse of the writ to bar Hamilton from ever raising such claims. At that time, abuse of the writ law in the Ninth Circuit provided that "previously

unadjudicated claims" raised in a subsequent petition would not be barred and "must be decided on the merits unless the petitioner has made a conscious decision deliberately to withhold them, is pursuing 'needless piecemeal litigation,' or has raised the claims only 'to vex, harass or delay.'" Richmond v. Ricketts, 774 F.2d 957, 961 (9th Cir. 1985), quoting Sanders v. United States, 373 U.S. 1, 18; Neuschafer v. Whitley, 860 F.2d 1470, 1477 (9th Cir. 1988).

On June 8, 1990, Hamilton identified 38 issues in compliance with the district court's March 6 Order, many of which were characterized as potential claims that were unexhausted and required further investigation and analysis. Hamilton was then ordered to pursue all unexhausted claims of which he was aware in state court, and was ultimately given until October 22, 1990, to do so. See

Order, September 18, 1990 (Appendix D). The September 18, 1990 Order stated that Hamilton will be deemed to have "voluntarily, knowingly, and intentionally waived and abandoned" all unexhausted claims not filed in state court and exhausted claims not filed in federal court by October 22, 1990. Id.

Petitioners incorrectly state that Hamilton expressly waived known claims in a federal court filing dated August 13, 1990. (Appendix C). The district court explicitly discounted petitioner's attempted waiver of potential claims. Id. (Appendix D, at A-177).

Hamilton, through his counsel, filed an amended and consolidated habeas petition in the district court on October 22, 1990, which did not include the potential claims identified in the June 8, 1990 filing or any other unexhausted claims. This was the first

counsel-assisted petition filed by Hamilton. Although petitioners describe several habeas corpus petitions filed in state and federal court by Hamilton, the amended and consolidated habeas corpus petition was considered by the district court to be a "first" petition for purposes of Rule 9(b) of the Rules Governing Section 2254 Proceedings. Appendix F, at A-192. Similarly, the habeas corpus petition filed in the California Supreme Court on December 30, 1991, discussed below, was the first and only counsel-assisted habeas corpus petition filed in state court. Neither the state or federal courts have found Hamilton's pro se petitions to contribute to any contention of abusive or successive petitions.

An evidentiary hearing, which encompassed only claims raised in the amended and consolidated petition, was

held from April 23, 1991 to May 9, 1991. Prior to the close of the evidentiary hearing, Hamilton's counsel moved to have the hearing held open to enable him to permit investigation and presentation of all potential claims in view of the then-just decided case of McCleskey v. Zant, 499 U.S. __, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), which appeared to require the presentation of all potentially meritorious claims in the first petition. The court denied this request. (Appendix E).

On July 1, 1991, Hamilton renewed his request, and moved to stay federal proceedings for 120 days to allow his counsel to conduct discovery and investigation of potentially meritorious claims, and to amend the habeas corpus petition to include such claims for which he might discover a sufficient basis. In support of the request to stay

proceedings, counsel provided a list of potentially meritorious claims which counsel declared may be reasonably supportable after further investigation. The court denied Hamilton's application to stay the proceedings on August 20, 1991, finding claims of which Hamilton was aware that had not been raised in the October 22, 1990 amended petition were waived and abandoned, and finding no basis to stay proceedings to allow Hamilton to investigate claims for which there was no supporting evidence. (Appendix F). On August 23, 1991, this court denied the amended and consolidated petition, and reiterated the finding of waiver and abandonment of claims. (Appendix A). On November 1, 1991, Hamilton's motion to alter or amend the judgment was denied.

On November 13, 1991, a certificate of probable cause was granted and a stay of execution issued pending

disposition of Hamilton's appeal of the denial of the petition for writ of habeas corpus before the Ninth Circuit Court of Appeals. Hamilton v. Vasquez, C.A. Nos. 91-56251; 91-56262; 91-56295; 91-56403; 91-80385.

Hamilton filed a habeas corpus petition in the California Supreme Court on December 30, 1991. This was the first counsel-assisted habeas corpus petition filed on petitioner's behalf in state court. The petition was denied on February 19, 1992, after informal briefing and without a hearing.

On March 17, 1992, Hamilton filed with the district court a request for a statement indicating its willingness to entertain a motion filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, together with the Rule 60(b) motion, which sought relief from judgment and permission to amend the petition with

the recently exhausted claims. In the Ninth Circuit, in order for the district court to consider a 60(b) motion while the case is pending on appeal, "the proper procedure is to ask the district court to indicate whether it wishes to entertain the motion, or to grant it, and then move [the Court of Appeal], if appropriate, for remand of the case." Long v. Bureau on Economic Analysis, 646 F.2d 1310, 1318 (9th Cir. 1981), vacated on other grounds, 454 U.S. 934 (1981), citing Smith v. Lujan, 588 F.2d 1304, 1307 (9th Cir. 1979). The Rule 60(b) motion was based in part on Hamilton's contention that his lawyers' failure to raise claims in the amended and consolidated petition for which they did not believe there was a sufficient factual basis, and their reliance on pre-McCleskey Ninth Circuit habeas corpus practice which did not bar raising such claims in a subsequent

petition, see e.g., Neuschafer v. Whitley, 860 F.2d 1470 (9th Cir. 1988), constituted excusable neglect under Fed. R. Civ. P. 60(b)(1).

On June 1, 1992, after ordering and receiving briefing on the issue, the district court entered an order which stated its willingness to entertain the Rule 60(b) motion. (Appendix H). On June 11, 1992, Hamilton filed a motion in the Ninth Circuit for an order remanding the case to the district court for consideration of the Rule 60(b) motion. On July 7, 1992, the Ninth Circuit issued a limited remand to the district court to enable that court to consider the Rule 60(b) motion, while at the same time ordering the parties to adhere to the briefing schedule it set for the appeal. (Appendix B). On July 17, 1992, petitioners filed a motion to recall the mandate in the Ninth Circuit and a

petition for reconsideration of the remand order. The Ninth Circuit denied the motion and petition on July 31, 1992. (Appendix J).

On July 27, 1992, the district court calendared the hearing on the 60(b) motion for August 26, 1992 and then subsequently rescheduled the hearing for August 25, 1992. Petitioners filed their petition for mandamus and prohibition with this Court on August 10, 1992. This Court denied petitioners' applications for a stay of the proceedings, and the hearing on the Rule 60(b) motion went forward as scheduled on August 25, 1992. The district court orally denied the Rule 60(b) motion. A written order has not yet been entered.

The appellate briefing is now being completed, and the parties are awaiting the scheduling of oral argument.

II. SUMMARY OF ARGUMENT

Respondent Hamilton contends that the granting of extraordinary relief is unnecessary because the proceedings which petitioners sought to prevent have occurred, the district court ruled in petitioners' favor, and any issue regarding the appropriateness of the proceedings can be raised in due course within the appeal currently pending before the Ninth Circuit.

Hamilton further contends that the limited remand by the Ninth Circuit, after the district court indicated a willingness to entertain the Rule 60(b) motion, was proper. The Circuit did not stay the briefing schedule on the pending appeal, but simply permitted the district court to consider whether relief under Rule 60(b) was appropriate.

Finally, Hamilton contends that Rule 60(b) is appropriate in habeas corpus

proceedings to avoid piecemeal litigation without unduly expanding the scope of the proceedings, and the application of a cause and prejudice requirement to Rule 60(b) would be a new rule that could not be retroactively applied to this case.

III. ARGUMENT

A. THERE IS NO NEED FOR RELIEF BY WAY OF EXTRAORDINARY WRIT

The writ of mandamus is a drastic remedy, "to be invoked only in extraordinary situations." Kerr v. United States District Court, 426 U.S. 394, 402 (1976); see also Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980). Mandamus is appropriate only where:

> the party seeking issuance of the writ [has] no other adequate means to attain the relief he desires, Roche v. Evaporated Milk Assn. [319 U.S. 21, 26 (1943)], and [satisfies] "the burden of showing that [his] right to issuance of the writ is 'clear and indisputable.'

Kerr v. United States District Court, 426

U.S. at 403, quoting Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953); see also Sup. Ct. R. 20.1.

Petitioners are unable to demonstrate that they have no other adequate remedy to redress what it contends was an improper remand from the Ninth Circuit. After this Court denied petitioners' application for a stay of proceedings in the district court, a hearing on Hamilton's Rule 60(b) motion was held, and the motion was denied in its entirety. Thus, the district court proceedings which petitioners seek to prevent have essentially concluded, and petitioners are no longer in need of such relief. Moreover, petitioners prevailed below in their contention that Hamilton's Rule 60(b) motion should be denied. Any issue regarding the appropriateness of the Rule 60(b) proceedings may be considered in the appeal currently before the Ninth

Circuit or in a concurrent appeal, and then if necessary, on certiorari before this Court. There is no need for this Court to intervene at this stage of the proceedings.

Petitioners' request for extraordinary relief to prevent the district court from ruling and to avoid any unnecessary delay it claimed might occur because of the limited remand for consideration of the Rule 60(b) motion is therefore moot, and the petition should be denied.

B. NINTH CIRCUIT REMAND TO ALLOW DISTRICT COURT TO CONSIDER RULE 60(b) MOTION AFTER IT STATED ITS WILLINGNESS TO DO SO WAS APPROPRIATE

On August 23, 1991, the district court denied Hamilton's habeas corpus petition and deemed additional claims that were not raised in the petition to be waived and abandoned. While the denial of petition was pending appeal in the Ninth Circuit, Hamilton exhausted claims in

state court, and then sought relief from judgment pursuant to Rule 60(b) to allow for the amendment of the previously denied petition with the newly exhausted claims.

Because the district court no longer had jurisdiction to consider the motion, Carriger v. Lewis, __ F.2d __, 92 DAR 10417 (9th Cir. 7/28/92); Long v. Bureau on Economic Analysis, 646 F.2d 1310, 1318 (9th Cir. 1981), vacated on other grounds, 454 U.S. 934 (1981), Hamilton was required, pursuant to Ninth Circuit practice, to ask the district court to indicate whether it wished to entertain the motion, and if it so indicated, to then move the Court of Appeals for a remand. Long, 646 F.2d at 1318, citing Smith v. Lujan, 588 F.2d 1304, 1307 (9th Cir. 1979). After requesting and receiving full briefing on the issue, the same district court which previously deemed waived the claims

Hamilton sought to amend by way of Rule 60(b), issued a statement of its willingness to consider the motion. Thereafter, upon Hamilton's motion, the Ninth Circuit issued a limited remand to enable the district court to do so.

The remand was limited and has not caused any delay. The Ninth Circuit did not stay its briefing schedule on the appeal. This limited remand merely gave the district court jurisdiction to determine whether Rule 60(b) was appropriate under the circumstances of this case. Accordingly, the district court ruled that while Rule 60(b) was appropriate in habeas corpus proceedings, it was severely curtailed by McCleskey v. Zant, and found that Hamilton failed to meet either the standards of McCleskey or Rule 60(b) to warrant relief. Upon the timely filing of a notice of appeal by Hamilton, the entire case will return to

the Ninth Circuit for its consideration. There is nothing for this Court to redress with an extraordinary writ.

C. RULE 60(B) IS APPROPRIATE IN HABEAS PROCEEDINGS

Petitioners contend that Rule 60(b) is not applicable in habeas corpus proceedings because it would be inconsistent with the procedural requirements of habeas corpus practice, specifically the authority governing abuse of the writ. See Rules 9(b) & 11 of the Rules Governing Section 2254 Proceedings. The granting of the Rule 60(b) motion in this case, however, would not have conflicted with these principles. It is precisely the avoidance of piecemeal litigation which Hamilton sought to accomplish by seeking to litigate all claims in one action. Amending the previously denied petition with newly exhausted claims would have furthered the

interests of judicial economy and allowed petitioner to proceed with all of his claims in one proceeding.

Rule 60(b) has traditionally been utilized in habeas corpus proceedings. See Gray v. Estelle, 574 F.2d 209 (5th Cir. 1978), citing Pitchess v. Davis, 421 U.S. 482 (1975). The filing of a Rule 60(b) motion by a habeas petitioner challenging a death judgment is not uncommon, although the granting of such relief is. See Carriger v. Lewis, __ F.2d __, 92 DAR 10417 (9th Cir. 7/28/92) (district court lacked jurisdiction to consider Rule 60(b) motion); May v. Collins, 961 F.2d 74 (5th Cir. 1992) (evidence did not warrant relief under 60(b)); Robison v. Maynard, 958 F.2d 1013 (10th Cir. 1992)(60(b) motion untimely because brought more than one year after entry of judgment); High v. Zant, 916 F.2d 1507 (11th Cir. 1990)(district court did

not abuse discretion in denying 60(b) motion on merits); Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990) (claim raised in 60(b) motion dismissed on merits). The use of Rule 60(b) in such cases has not resulted in the wholesale expansion of federal habeas proceedings which petitioners allegedly fear. On the contrary, the one year timeliness requirement, the standards for granting the motion, and the jurisdictional hurdles to overcome once the habeas corpus petition has been denied, have provided sufficient safeguards to ensure "prompt resolution of the matter consistent with . . . fair consideration to all the issues presented in the case." In re Blodgett, 502 U.S. __, 116 L.Ed.2d 669, 112 S.Ct. 674 (1992).

Petitioners essentially seek to engraft a cause and prejudice analysis to Rule 60(b). This would constitute a

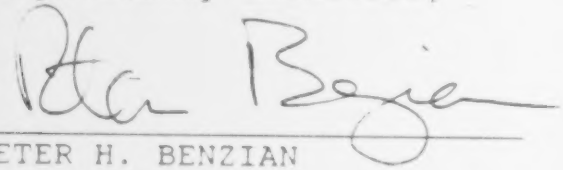
rewriting of the Federal Rules of Civil Procedure. The grounds for granting relief pursuant to Rule 60(b) include "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . .; (3) fraud . . . misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b). A requirement of cause and prejudice would impose new and different standards on habeas petitioners seeking relief from judgment under Rule 60(b). Such a new rule would not be dictated by prior precedent. As such, it could not be retroactively applied to this case. Teague v. Lane, 489 U.S. 288 (1989). Moreover, such a radical departure from federal procedure should not be imposed through the issuance of the drastic remedy of an extraordinary writ.

IV. CONCLUSION

Based on the foregoing, respondent Hamilton requests that this Court deny the writ of mandamus and writ of prohibition.

DATED this 9th day of September, 1992.

Respectfully submitted,



PETER H. BENZIAN

Attorney for Respondent

RICHARD CAMINO

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

PETER H. BENZIAN
Latham & Watkins
701 "B" Street, Suite 2100
San Diego, California 92101-8197
(619) 236-1234

RICHARD CAMINO
17541 East 17th Street,
Second Floor
Tustin, California 92680
(714) 832-6620

October Term 1992
Case No. 92-265

DANIEL VASQUEZ, Warden
DANIEL E. LUNGREN,
Attorney General of the
State of California,

Petitioners,

v.

BERNARD LEE HAMILTON,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 701 "B" Street, Suite 2100, San Diego, California 92101-8197.

I have served the within BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS as follows: To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

DANIEL E. LUNGREN
Attorney General of
the State of California
PAT ZAHAROPOULOS
Supervising Deputy Attorney General
110 West "A" Street, Suite 700
San Diego, California 92101
(619) 237-7857

Attorneys for Petitioners

Hon. Rudi M. Brewster, Judge
United States District Court
940 Front Street
San Diego, CA 92189

Wendy Peoples
Staff Attorney
California Appellate Project
One Ecker Place, 4th Floor
San Francisco, CA 94105

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 9th day of September, 1992.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, September 9, 1992.

Donna J. Whitney
DONNA J. WHITNEY

Subscribed and sworn to before me
this 9th day of September, 1992.

Catherine L. Kilcrease
Notary Public in and for said County and State

OFFICIAL SEAL
CATHERINE L KILCREASE
NOTARY PUBLIC-CALIFORNIA
SAN DIEGO COUNTY
MY COMM. EXP. APR. 16,1993

SD23\WP51\PHB2\HAMILTON\USSUPREM.POS